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80-5161

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980.

No. _____

KURK KENDALL JOHNSON, Petitioner,

vs.

STATE OF OKLAHOMA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
CRIMINAL COURT OF APPEALS OF
THE STATE OF OKLAHOMA

BILLY LEON HESKETT

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(918-287-1545)

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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KURK KENDALL JOHNSON, Petitioner,

vs.

STATE OF OKLAHOMA, Respondent.

QUESTION PRESENTED

Whether it violates the United States Constitution's Fifth Amendment prohibition against former jeopardy for the State of Oklahoma to prosecute petitioner for ~~first~~ second degree murder under Title 21, § 701.2 (now repealed), of the Oklahoma Statutes, where it has formerly prosecuted him for kidnapping for purposes of extortion under Title 21, § 745, of the Oklahoma Statutes, when the matter arose out of the same transaction.

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KURK KENDALL JOHNSON, Petitioner,

vs.

STATE OF OKLAHOMA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
CRIMINAL COURT OF APPEALS OF
THE STATE OF OKLAHOMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Oklahoma, entered the 21st day of May, 1980.

OPINIONS BELOW

The Court of Criminal Appeals of the State of Oklahoma assumed jurisdiction upon petitioner's appeal and entered its opinion of 24 June, 1976, denying said appeal. See Johnson v. Oklahoma, 51 Okla. Bar J. 1411 (1980).

JURISDICTION

The Judgment of the Court of Criminal Appeals of the State of Oklahoma was pronoucned as aforesaid on the 21st day of May, 1980. The jurisdiction of this Court is invoked under Title 28, § 1257(3) of the United States Code.

Article 7, §1, of the Constitution of Oklahoma provides:

> "The judicial power of this State shall be vested in the Senate, sitting as a court of impeachment, a Supreme Court, District Courts, County Courts, Courts of Justices of the Peace, Municipal Courts, and such other courts, commissions or boards, inferior to the Supreme Court, as may be established by law."

Under Title 2, §40, of the Oklahoma Statutes, the following provisions place the appellate jurisdiction of all criminal cases in the Court of Criminal Appeals, to wit:

> "The Criminal Court of Appeals shall have exclusive appellate jurisdiction, co-extensive with the limits of the State, in all criminal cases appealed from the district, superior and county courts, and such other courts of record as may be established by law."

It is well settled that when the Court of Criminal Appeals was established by law with exclusive appellate jurisdiction in criminal cases, such jurisdiction ceased on the part of the Supreme Court of Oklahoma and the Court of Criminal Appeals became in fact and in law the Supreme Court of the State of Oklahoma in all criminal cases. See Corley v. Adair County Court, 10 Okla. Cr. 104, 134 Pac. 835 (1913); Buck v. Dick, 27 Okla. 854, 113 Pac. 930 (1911). Therefore, judgment issued on the 21st day of May, 1980, was a decision by the highest state tribunal having jurisdiction in such matters.

QUESTIONS PRESENTED

(1) Whether it violates the United States Constitution's Fifth Amendment prohibition against former jeopardy for the State of Oklahoma to prosecute petitioner for ~~first~~ second degree

murder under Title 21, § 701.2 (now repealed), of the Oklahoma Statutes, where it has formerly prosecuted him for kidnapping for purposes of extortion under Title 21, § 745, of the Oklahoma Statutes, when the matter arose out of the same transaction.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the former jeopardy prohibition clause of the Fifth Amendment of the United States Constitution as made applicable to the States through the due process clause of the Fourteenth Amendment. See Benton vs. Maryland, 395 U. S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056. The Fifth Amendment reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." [Emphasis added.]

STATEMENT OF CASE

I. Procedural History of the Case.

The double jeopardy issue was first presented to the Osage County District Court on December 8, 1975. At that time the petitioner entered a plea of double jeopardy to the first degree murder charge and filed a motion to strike all references to the

crime of kidnapping from the information for first degree murder. The motion was denied. The petitioner then petitioned the Oklahoma Court of Criminal Appeals for a writ of mandamus ordering the Osage County District Court to grant the motion to strike. The Oklahoma Court of Criminal Appeals, first issued same but, upon rehearing, denied the writ.

The United States Supreme Court granted certiorari, vacated the order of the Oklahoma Court of Criminal Appeals denying the writ of mandamus, and remanded for further consideration with particular attention to Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), and Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). See Johnson v. Hampton, 434 U.S. 947, 98 S.Ct. 471, 54 L.Ed.2d 307 (1977).

On remand the Oklahoma Court of Criminal Appeals held that the crime of first degree murder, necessarily included the lesser offense of kidnapping for the purpose of extortion and prohibited the trial of the petitioner as originally charged, stating:

> "This order is made without prejudice to the trial of the said Kurk Kendall Johnson on any charge of homicide which the facts and justice may warrant, not inconsistent with the views expressed by the Supreme Court of the United States in Brown v. Ohio and Harris v. Oklahoma, supra."

See Johnson v. Hampton, Okla. Cr., 572 P.2d 1301 (1978). Subsequently, over the petitioner's renewed plea of double jeopardy, he was convicted of the crime of Murder in the Second Degree.

Upon the second degree murder conviction, petitioner took a timely appeal still asserting the grounds of double jeopardy. The Oklahoma Court of Criminal Appeals on 21 May, 1980,

affirmed the conviction and denied the plea of double jeopardy. See Johnson v. Oklahoma, 51 Okla. Bar J. 1411 (1980). Same was a final judgment of the State of Oklahoma's court of last resort in criminal matters. See Okla. Const., Art. 7, §1; 2 Okla. Stat. §40; and 22 Okla. Stat. §1070.

II. The Facts Material to the Questions Presented.

Kurk Kendall Johnson, the petitioner herein and the defendant in Case No. CRF-75-690, District Court of Tulsa County, and Case No. CRF-75-294, District Court of Osage County, is hereinafter referred to as Johnson. The State of Oklahoma is hereinafter referred to as State.

The State in the Tulsa County case charged and convicted Johnson with the crime of "kidnapping for purpose of extortion." Johnson was sentenced to sixty (60) years with the Oklahoma Department of Corrections. In the Osage County case, Johnson was charged by the State with the crime of murder in the first degree, but same was reduced to murder in the second degree. Johnson was convicted and sentenced to ten (10) years to life with the Oklahoma Department of Corrections. He appealed but the conviction was, as aforesaid, affirmed.

The State, at the Tulsa County trial and the Osage County trial, introduced evidence that Johnson and one Larlan Keith Knight kidnapped Earl Edward Bell when he was leaving his place of employment in downtown Tulsa. The State's evidence further attempted to show that they took Bell in Johnson's automobile to Johnson's apartment in Tulsa, leaving Bell in the trunk of the car. They allegedly attempted to extort monies for Bell's safe

return, but were unsuccessful, and Knight went home and out of town the next day on a trip with members of his family. The State further attempted to show that Bell was found dead in Osage County, that shell casings found at the scene were fired by Johnson's gun and that a witness identified Johnson as the kidnap caller, together with other evidence.

III. Federal Question of Fifth Amendment Double Jeopardy Raised in All Courts Below.

The double jeopardy questions were raised at all stages in the courts below commencing with arraignment in the district court. The questions were raised:

(1) At arraignment;

(2) Again by motion;

(3) By original writ of mandamus filed in the Oklahoma Court of Criminal Appeals;

(4) By petition for certiorari filed in the United States Supreme Court;

(5) By motion, styled second plea of double jeopardy, filed and presented prior to trial;

(6) At the trial; and

(7) Again on appeal to the Oklahoma Court of Criminal Appeals.

The constitutional question of double jeopardy has been continuously urged and preserved.

ARGUMENT

I.

Certiorari Should be Granted in the Instant Case Because

an Important Question Affecting the Prosecution of Criminal Cases and the Rights of Accused Throughout the Nation Under the Fifth Amendment is Involved: The Constitutional Doctrine of Double Jeopardy Should Forbid the States from Prosecuting Citizens for Multiple Offenses Arising Out of the Same Transaction.

The Fifth Amendment to the United States Constitution provides:

> " * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

This amendment has been made applicable to the States by the Fourteenth Amendment. See Benton v. Maryland, supra.

As noted by the Oklahoma Court of Criminal Appeals in its opinion affirming this case, the courts have utilized "dual" constitutional standards by utilizing two tests referred to as (1) the "same transaction test" and (2) the "same evidence test", or a variation of the two. See Johnson v. Oklahoma, supra; and also, Cowler v. Oklahoma, Okla. Cr., 589 P.2d 682 (1979). Further, the Oklahoma Court of Criminal Appeals, in the case below, argues that the United States Supreme Court has not said any one standard is required by the Fifth Amendment.

Johnson respectfully submits there should be but one test or standard interpreting a provision of the Federal Constitution, and the test as same relates to the double jeopardy prohibition should be the standard in the minds of the framers of the bill of Rights when drafted and when adopted. However, presently both the "one transaction test" and "the same evidence test" and/or a variation thereof, are applied without uniformity in the United States, notwithstanding a majority of state and federal courts follow "the same evidence test." See Twice in Jeopardy, 75 Yale L.J. 262 (1965); Note, Criminal Law: The Same

Offense In Oklahoma -- Now You See It, Now You Don't, 28 Okla.L. Rev. 131 (1975); Pennsylvania v. Campana, 452 Penn. 233, 304 A.2d 432 (1973); Oregon v. Brown, Oreg., 497 P.2d 1191 (1972); Note, Criminal Law-Double Jeopardy-Should "Offense" be Defined in Terms of Substantive Law? 38 Mo.L.Rev. 528 (1973); Note, The Protestion Against Multiple Trials, 11 Stan.L.Rev. 735 (1958).

The Bill of Rights to our Federal Constitution was proposed to the legislatures of the several states by the First Congress on 25 September, 1789. These first ten amendments were ratified by the following states, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: Delaware, 28 January, 1790; Maryland, 19 December, 1789; New Hampshire, 25 January, 1790; New Jersey, 20 November, 1789; New York, 27 March, 1790; North Carolina, 22 December, 1789; Pennsylvania, 10 March, 1790; Rhode Island, 15 June, 1790; South Carolina, 19 January, 1790; Vermont, 3 November, 1791; and Virginia, 15 December, 1791. Said states thereby met adoption requirements for said amendments and made them the law of the land prior to 1792. See U.S.C.S., Const., Amend., p. 709.

The "same evidence test" was for the first time judicially employed in the English case of Rex vs. Vandercomb and Abbott, 2 Leach 707, 168 Eng.Rep. 455 (1796). This was in 1796 or approximately four years after ratification and adoption of the Bill of Rights. Yet, it was seventy-six long years thereafter before the "same evidence test" was first applied in the United States. See Morey vs. Massachusetts, 108 Mass. 433 (1871). This was 80 years after adoption of the Bill of Rights and its

Fifth Amendment Double Jeopardy Clause.

Obviously, the framers of the Bill of Rights did not have the "same evidence test" in mind when writing the Fifth Amendment. It was not, at the time, a part of the English common law. The English judges did not invent same until four years after the adoption, nor were American judges to judicially proclaim same until another seventy-six years passed.

The Fifth Amendment Double Jeopardy Clause was to prohibit successive criminal prosecutions arising out of one transaction or episode! Such test simply forbids prosecution where the offense arose "out of the same transaction or episode" notwithstanding the "different evidence" or separate and distinct statutes. See Antieau, Modern Constitutional Law, Vol. 1, §5:29, p. 313.

The "same evidence test" has many critics. They include in their ranks recent and current members of the United States Court. In Ashe v. Swenson, 397 U.S. 436, 451, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), Justice Brennan, in a separate opinion joined in by Justice Douglas and Justice Marshall, made a sharp critique of the "same evidence test", and pointed out that it "virtually annuls the constitutional guarantee" of the Fifth Amendment. Justice Brennan said:

> ". . . The 'same evidence' test permits multiple prosecutions where a single transaction is divisible into chronologically discrete crimes . . . . Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal

> prosecution, the potentialities for abuse inherent in the 'same evidence' test are simply intolerable."

Further, it should be noted that England, the originator of the "same evidence doctrine", has now deserted same. See Connelly v. Director of Public Prosecutions, A.C., 1254 (1964).

The problem is that not only does the "same evidence test" depart from the founders' intent, the legislative separately defined substantive crimes make infinite the number of substantive offenses that may arise from a single criminal episode. As the Oklahoma Court of Criminal Appeals pointed out in this case:

> "* * * mechanical application of the 'same evidence test' results in a decrease in the double jeopardy protection."

See Johnson v. Oklahoma, supra.

"The constitutional prohibition against 'double jeopardy,'" stated the United States Supreme Court in Green v. United States, 355 U.S. 184, 2 L.Ed.2d 199, 78 S.Ct. 211, 61 A.L.R.2d 1119, "was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." This Court added:

> "The underlying idea...is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty."

In the instant case, the evidence in the Tulsa County kidnapping case and the evidence in the Osage County second degree murder case were virtually identical. While the offenses are

different, and the elements there are not the same, the evidence was the same, as was the transaction. It was but one criminal episode.

Johnson respectfully suggests that Oklahoma having elected to prosecute and having gotten a conviction of kidnapping, could not again prosecute and convict him for any other offenses connected with that single episode, including the charge of murder in the second degree. To allow Oklahoma to obtain both convictions violates Johnson's rights guaranteed by the Fifth Amendment Double Jeopardy Clause as envisioned by its framers.

PRAYER

WHEREFORE, Petitioner Johnson respectfully requests that a writ of certiorari issue to the Court of Criminal Appeals of the State of Oklahoma, and that the conviction therein be reversed, remanded and dismissed.

Respectfully submitted,

Billy Leon Heskett

(Court Appointed Attorney for Petitioner)

Jack Duane Heskett

(Co-counsel)

304 First National Bank Building
Pawhuska, Oklahoma 74056

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

KURK KENDALL JOHNSON, Petitioner,

vs.

STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
CRIMINAL COURT OF APPEALS OF
THE STATE OF OKLAHOMA

A P P E N D I X

(Transcript of Proceedings)

I, the undersigned Deputy Clerk of the Court of Criminal Appeals, State of Oklahoma, do hereby certify that the attachments hereto are a complete roll of all the petitions, pleadings, orders and judgments in Case No. F-78-516, Court of Criminal Appeals of the State of Oklahoma, same being styled Kurk Kendall Johnson, Appellant, vs. State of Oklahoma, Appellee, and that said documents hereto attached, are, as noted thereon, true and correct copies of all such petitions, pleadings, orders and judgments.

Dated this 24th day of July, 1980.

ROSS N. LILLARD, JR., Clerk

COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

By: Judy Wilson

(S E A L)

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IN THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
SEP 15 1978
Ross N. Lillard, Jr.
CLERK

No. F-78-516

FURL KENDALL JOHNSON,

Appellant,

vs.

THE STATE OF OKLAHOMA,

Appellee.

P E T I T I O N I N E R R O R

COME NOW the appellant, Furl Kendall Johnson, by and through his court appointed attorney, Bill Peskett, of Pawhuska, Oklahoma, and petitions the Court against the State of Oklahoma, appellee, to reverse, dismiss and/or remand for new trial his conviction in case number CRF-75-294, District Court of Osage County, State of Oklahoma, and in support thereof states:

(1) That this appeal is from the aforesaid case, the Honorable Don H. Hampton, District Judge, presiding.

(2) That the appellant was convicted of the crime of Murder, Second Degree, by a jury trial, the verdict being returned on the 7th day of March, 1978, and judgment and sentence was imposed thereunder on the 29th day of March, 1978, in said District Court.

(3) That in accordance with said jury verdict the appellant was sentence to life imprisonment with the State Department of Corrections.

(4) That a motion for new trial was tirely filed on the 5th day of April, 1978, and denied by the District Court on the 7th day of April, 1978.

(5) That the appellant was already serving a sixty (60) year sentence from the District Court of Tulsa County, State of Okla-

homa, on a charge arising out of the same incident, and therefore, no bond was sought.

(f) That the following errors of law are urged as having been committed during the progress of the trial and the proceedings relating thereto:

(a) Error of the Court in overruling the appellant's [illegible] se writ of habeas corpus, motion to dismiss and [illegible] plea of former jeopardy.

(b) Error of the Court in overruling the appellant's [illegible] to suppress.

(c) Error of the Court in overruling the demurrer to the evidence.

(d) That the verdict and judgment are not sustained by sufficient legal evidence and are contrary to law.

(e) That the closing argument of the State was irregular and contrary to law and that throughout the trial there were leading and suggestive questions by the State, which errors were objected to by appellant.

WHEREFORE, Appellant prays that said judgment and sentence be set aside with the action dismissed and/or reversed and remanded for a new trial.

Attorneys for Appellant

[illegible]

[illegible] Hesbett
P. O. Box 447
Pawhuska, Oklahoma 74056
(918/287-1545)

VERIFICATION AND AFFIDAVIT IN FORMA PAUPERIS

STATE OF OKLAHOMA, Osage County) ss.

[illegible] Hesbett, of lawful age and being first sworn, [illegible] states that he is the court appointed attorney for [illegible] that the contents of the foregoing instrument [illegible] and subscribed by him; that the affidavit is not made by the appellant himself and is made by the affiant for the reason that [illegible]

lant is presently not within the County, [illegible] in the Oklahoma State Penitentiary; that affiant knows and [illegible]'s the statements therein contained and that same are true; that the appellant is a poor person without funds or property or relatives willing to assist him in paying for filing the within instrument, as is more fully evidenced by "Exhibit A" attached hereto and made a part hereof.

[illegible]

Subscribed and sworn to before me this 14th day of September, 1979.

[illegible], Notary Public.

My commission expires: 29 October 1981.

(S E A L)

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on the [illegible] September, 1979, a true and correct copy of the above and foregoing instrument was mailed to:

Larry Derryberry
Attorney General
State Capitol Building
2302 Lincoln Blvd.
Oklahoma City, Oklahoma 73105

and

Miller Hall, Esq.
District Attorney
Pawnee County Courthouse
Pawnee, Oklahoma

with postage thereon [illegible]

I, Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Petition for Writ in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 24 day of July 1980.

Clerk

By Judy Wilson
DEPUTY

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN 12 1979
Ross N. Lillard, Jr.
CLERK

No. F-78-516

IN THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA

KURK KENDALL JOHNSON, Appellant,

vs.

STATE OF OKLAHOMA, Appellee.

BRIEF OF APPELLANT IN SUPPORT OF PETITION IN ERROR

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IN THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA

No. F-78-516

KURK KENDALL JOHNSON,

Appellant,

vs.

STATE OF OKLAHOMA,

Appellee.

BRIEF OF APPELLANT IN SUPPORT OF PETITION IN ERROR

The appellant, Kurk Kendall Johnson, hereinafter called Johnson, appeals from a jury verdict of guilty to a charge of Second Degree Murder. The conviction arises out of the District Court of Osage County. The appellee is hereinafter referred to as the State.

Statement of Fact and Procedural History: The State arrested the defendant, Kurk Kendall Johnson, on the 31st day of March, 1975. He was thereafter charged with Kidnapping for Purposes of Extortion in the District Court of Tulsa County, Oklahoma, and with the crime of First Degree Murder, 21 Oklahoma Statutes § 701-1, in the District Court of Osage County, State of Oklahoma.

A preliminary hearing was held in both cases. Johnson was bound over for trial on both charges in the respective District Courts.

On the 5th day of September, 1975, Johnson was convicted of Kidnapping for Purposes of Extortion by a Tulsa County District Court jury. He was sentenced to sixty (60) years and his appeal of that conviction was sustained by this honorable Court. See Johnson vs. State, Okla. Cr., 554 P.2d 51.

Before a trial for murder was held in Osage County, Johnson filed a plea of double jeopardy and a motion to strike from the First Degree Murder information the words relating to Kidnapping for Purposes of Extortion. The District Court overruled the plea and the motion. Thereupon, Johnson filed a writ of mandamus in this Court seeking to have the words striken from the information. The writ was denied and Johnson filed a petition for certiorari in the United States Supreme Court. The Supreme Court granted certiorari and vacated this Court's denial of mandamus, ordering that it consider the matter in light of Brown vs. Ohio, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221, and Harris vs. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912.

After the foregoing, this Court prohibited the District Court of Osage County from proceeding with the First

Degree Murder charge under Title 21, Section 701.1 of the Oklahoma Statutes [Laws 1973, c. 167, § 1]. This Court directed that the words relating to the kidnapping be striken from the information and stated:

> "This order is made without prejudice to the trial of the said Kurk Kendall Johnson on any charge of homicide which the facts and justice may warrant, not inconsistent with the views expressed by the Supreme Court of the United States in Brown vs. Ohio and Harris vs. Oklahoma, supra."

Thereafter, the Honorable Don H. Hampton, District Judge, District Court of Osage County, struck the words relating to the kidnapping from the information. The State, over a renewed plea of former jeopardy and pro se motions relating to estoppel by judgment and double jeopardy, all of which were overruled by the District Court, proceeded to try Johnson for Second Degree Murder.

The State contended at the trial that Johnson and one Harlan Knight on the 30th day of March, 1975, kidnapped Earl Edward Bell at knife point and placed him in the trunk of Johnson's vehicle. Further, the State contends that later that night Harlan Knight left Johnson's company, Bell still being in the trunk of Johnson's vehicle.

The next day Knight, according to the State, went with members of his family to visit relatives in suburban

Kansas City. Meanwhile, Johnson, according to the State, attempted to extort members of Bell's family for ransom.

The Tulsa Police Department made recordings of the ransom calls. One of the calls made reference to an employee of the Picadilly Cafeteria in Tulsa. Inasmuch as Bell was assistant manager of the cafeteria, the Tulsa Police contacted the employee, had him listen to the tapes, and, according to the State, the employee identified the voice on the tapes as that of Johnson.

The Tulsa Police after some four or five hours, went to Johnson's home and arrested him on an old traffic warrant. Johnson was removed and thereafter, without a search warrant, officers searched Johnson's vehicle and found various articles, including a .22 caliber rifle which the State contends was used to kill Bell who was later found shot to death and laying in a ditch in Osage County.

As hereinbefore stated, a Tulsa jury convicted Johnson of Kidnapping for Purposes of Extortion and he was sentenced to sixty (60) years. Harlan Knight, under a separate information, pleaded guilty to Kidnapping and was sentenced in Tulsa County to fifteen (15) years.

The jury convicted Johnson of Second Degree Murder and Judge Hampton, on the 29th day of March, 1978, sentenced

him to serve ten years to life with the State Department of Corrections.

Johnson filed a timely motion for new trial which the District Court overruled. Thereafter, this appeal was timely taken.

I. Error of the Trial Court in Ruling Appellant's Pro Se Writ of Habeas Corpus and the Motion to Dismiss (Second) Plea of Former Jeopardy.

The Supreme Court of the United States in Johnson vs. Hampton, District Judge, 429 U.S. 943, 50 L.Ed.2d 314, 97 S.Ct. 364, ordered that this matter proceed in light of Brown vs. Ohio, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221, and Harris vs. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912. This Court on the 4th day of January, 1978, ordered that the matter proceed in light thereof. See Johnson vs. Hampton, District Judge, Okla. Cr., 572 P.2d 1301.

In the Harris Case, supra, the Supreme Court stated:

> "A person who has been tried and covicted for a crime which has various incidents included in it, cannot be a second time tried for one of those incidents without being twice put in jeopardy for that same offense."

In Brown vs. Ohio, supra, the Supreme Court stated that:

> "Where successive prosecutions are at stake, the guarantee [against double jeopardy] serves 'a constitutional policy of finality for the defendant's benefit.'"

This constitutional prohibition is profoundly stated:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy for life or limb."

See U. S. Const., 5th Amend.; and also, Okla. Const., Art. 2, § 21; 22 Okla. Stat. §§ 14, 522.

"The constitutional prohibition against 'double jeopardy,'" stated the Supreme Court in Green vs. United States, 355 U.S. 184, 2 L.Ed.2d 199, 78 S.Ct. 221, 61 A.L.R.2d 1119, "was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." The Supreme Court added:

> "The underlying idea...is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty."

This amendment has been made applicable to the States by the Fourteenth Amendment. See Benton vs. Maryland, 395 U.S.

784, 23 L.Ed.2d 707, 89 S.Ct. 2056.

In Brown vs. Ohio, supra, the Supreme Court further said:

> "The Double Jeopardy Clause 'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'"

It continued that the policy protects the accused:

> "...from attempts to secure additional punishment after a prior conviction and sentence, see Green vs. United States, 355 U.S. 184, 187-188, 2 L.Ed.2d 199, 78 S.Ct. 221; 77 Ohio L.Abs. 202, 61 A.L.R.2d 1119 (1957); cf. North Carolina vs. Pearce, supra, [395 U.S. 711, 717, 23 L.Ed.2d 656, 89 S.Ct. 2072]."

While Johnson recognizes the Blockburger Test as the established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment, the Supreme Court in a footnote and in its holding in the Brown Case, supra, held that the Blockburger Test is not the only standard for testing the constitutional requirement. See Blockburger vs. United States, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180; footnote 6, 97 S.Ct. 195. In the Brown Case, supra, the defendant was arrested nine days after he had stolen an automobile, the defendant pleaded guilty

to a misdemeanor charge of joyriding [taking or operating a car without the owner's consent under Ohio law], the joyriding charge having been based on the defendant's driving of the automobile on the last day of his nine day joyride. Thereafter, the defendant pleaded guilty in a court to a felony auto theft charge based on his original taking of the auto, the Ohio courts rejecting the defendant's double jeopardy objections. The Supreme Court in refusing to apply the Blockburger Test to these circumstances noted:

> "Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. Thus in Ashe vs. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970), where an acquittal on a charge of robbing one of several participants in a poker game established that the accused was not present at the robbery, the Court held that principles of collateral estoppel embodied in the Double Jeopardy Clause, barred prosecution of the accused for robbing the other victims. And in In Re Nielsen, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 672 (1889), the Court held that a conviction of a Mormon on a charge of cohabiting with his two wives over a two-and-one-half year period barred a subsequent prosecution for adultery with one of them on the day following the end of that period."

The Supreme Court, in that note, continues:

> "In both cases, strict application of the Blockburger test would have permitted im-

position of consecutive sentences had the charges been consolidated in a single proceeding. In Ashe, separate convictions of the robbery of each victim would have required proof in each case that a different individual had been robbed. See Ebeling vs. Morgan, 237 U.S. 625, 59 L.Ed 1151, 35 S.Ct. 710 (1915). In Nielsen, conviction for adultery required proof that the defendant had sexual intercourse with one woman while married to another; conviction for cohabitation required proof that the defendant lived with more than one woman at the same time. Nonetheless, the Court in both cases held the separate offenses to be the 'same' for purposes of protecting the accused from having to 'run the gantlet a second time.' Ashe, supra, at 446, 25 L.Ed.2d 469, 90 S.Ct. 199, 78 S.Ct. 221; 77 Ohio L.Abs. 202, 61 A.L.R.2d 1119 (1957).

Because we conclude today that a lesser included and greater offense are the same under Blockburger, we need not decide whether the repetition of proof required by the successive prosecutions against Brown would otherwise entitle him to the additional protection offered by Ashe and Nielsen."

Clearly, Johnson had to "run the gantlet" twice, once for the kidnapping and again for the charge of second degree murder, notwithstanding that they were as in Nielsen, supra, one transaction and actually the "same" crime.

The charges in In re Nielsen, supra, were for crimes involving different proof. Adultery required proof of:

(1) Intercourse with one woman,

(2) While married to another woman.

Cohabitation required proof of:

The defendant having lived with more than one woman at the same time.

Yet, to prevent the prosecution from attempting to secure additional punishment after a prior conviction and sentence, the Supreme Court held that the offenses were the "same" for purposes of protecting the defendant from having to "run the gantlet" a second time.

Here, the evidence in the Tulsa County kidnapping case and the evidence in the Osage County second degree murder case is not just "overlapping", except for a few facets of testimony relating to arrest, etc., it is identical. Cf. Iannelli vs. United States, 420 U.S. 770, 785 n 17, 43 L.Ed.2d 616, 95 S.Ct. 1284. The charges against Johnson became a "trial by ordeal". He was forced by the District Court to "run the gantlet" a second time.

It should be noted that England, the country from which the double jeopardy doctrine came to us, has again adopted the "same evidence test". See Connelly vs. D.P.P., AC 1254. The test would simply forbid prosecution where the offense arose "out of the same transaction" notwithstanding the "different evidence" or separate and distinct statutes. Further, Justices Brennan, Douglas and Marshall have urged the adoption of this test. See Ashe vs. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 481, 90 S.Ct. 1189; Brown vs. Ohio, supra; Thompson vs. Oklahoma, 429 U.S. 1053, 50 L.Ed.2d 770, 97 S.Ct. 768.

Johnson submits that the time has come when this Court, like those in England, must reconsider the logic of the State's position in light of the "real" meaning of the fundamental prohibition against double jeopardy. Further, the standard of Nielsen should, Johnson submits, be applied in this case, thereby forbidding this prosecution.

II. Error of the Court in Ruling the Appellant's Motion to Supress and His Demurrer to the Evidence.

In Johnson vs. State, Okla. Cr., 554 P.2d 51, this Court held that it was proper for the Tulsa police officers to go to the home of the defendant, arrest him, take him away, open the trunk of defendant's automobile and search the trunk where they found incriminating evidence. The cited case was an appeal arising out of the trial for kidnapping of Bell, and while the facts relate to that case in the present case, the evidence relating to the search is nonetheless, different. See Tr., Sundry Motions, 27 Feb., 1978, pp. 3-14.

In this case, the evidence is that while the Tulsa police had learned from telephone tapes from the "ransom caller" that Bell was in the trunk of the "ransom caller's" automobile, they, through the same method or source, later learned that he was no longer in the trunk of the car. These tapes were introduced in evidence at the trial in the State's case in chief

over objection and after Johnson had moved to suppress them. See Trial Tr., pp. 171, 419. The "ransom caller", subsequent to his earlier phone call stating that Bell was in the trunk of his car, advised that he was not there any more. See Trial Tr., pp 419 (tapes of telephone calls).

The State's witness William Lee Hadley testified that the Tulsa police played the tapes of the "ransom caller" to him. He stated that he recognized the voice of the caller as "Kurk Kendall Johnson". See Trial Tr., pp. 212-219.

Carroll E. Gatlin, a detective with the Tulsa Police Department and a witness for the State, testified that it was approximately 3 o'clock P.M., on the day in question, when he went back to the Department and he, together with other officers talked with Hadley. Further, he testified that it was not until approximately 9 o'clock P.M., of that date that the officers went to Johnson's residence. See Trial Tr., pp. 375-377. According to Gatlin, the officers had spent their time searching for an old bench warrant on a traffic ticket, interviewing William "Peanuts" Johnson, etc. It was only after the foregoing that the officers then went to Johnson's apartment at approximately 9 o'clock P.M., that day.

Gatlin's testimony as to what the officers did when they got there is as follows:

"Q All right. Would you tell the Court, please, Carroll, when you went to the back of the house there with the other officer, could you view into the house?

A Yes, sir. We could.

Q Could you see any individuals laying on the bed?

A Yes, sir. We could.

Q Was that individual later determined by you to be Kurk Kendall Johnson?

A Yes, sir. It was.

Q Was he dressed?

A I don't remember.

Q Did you then go to the front of the house and knock on the door?

A Yes, sir.

Q You were present when the lady came to the door?

A Yes, sir. I was.

Q All right. And you entered. Is that correct?

A I think we stepped inside. Yes, sir.

Q Is it not true, to refresh your memory, that Kurk Kendall Johnson had to get dressed?

A Yes, he did, because we went in and watched him while he got dressed; walked in the bedroom with him. Yes, sir.

Q And you waited for him to get dressed.

A That's correct.

Q And you waited for that other car to come.

A Yes, sir.

Q All right. And when that police car came, you delivered Kurk Kendall Johnson to officers that came to that call. Is that correct?

A Yes, sir.

Q Now, Carroll, it was after that that you went to see Adrian Knowles and you got keys to the car. Is that right?

A Well, this all happened like in a period of two to three minutes, because the cars were already in the area.

Q That took them to get the car there?

A Yes, sir, from that time, and I'm not sure whether Kurk had left the premises at the time we looked in. There was a very short time span from the time he left until the time he looked in the trunk.

Q You handed him to the car -- you turned him over to the car that came to your summons. Isn't that correct?

A That is correct.

Q And you left him there with that car and then went back and looked in the car, did you not?

A When you say went back, went back where?

Q To the car.

A Yes, sir.

Q You had to get the keys from Adrian Knowles?

A Sargeant [sic] Putnam did, yes, sir.

Q Then you went to the car, did you not?

A Yes, sir.

Q All right. When you went to the car, did you ever have a conversation -- let me ask you this. Did you ever have a conversation with Kurk Kendall Johnson that evening about looking in the car?

A No, sir. I did not.

Q All right, sir. In other words, he was removed from the premises by a police car. He didn't come to your attention again after you started looking at the car, did he?

A No, sir."

See Trial Tr., pp. 383-385.

Obviously, the officers did not believe Bell was in the trunk of Johnson's automobile. They took hours to get to the apartment and when they got there they waited on Johnson to dress and waited for a police car to pick him up and take him downtown.

Clearly, the evidence presented at the trial in Johnson vs. State, supra, is far different. There the Court was lead by the State to believe that "time was of the essence" in the words of Judge Bussey. Further, it was stated by Judge Bussey, "An emergency was at hand." However, under the evidence in the instant matter, the officer's testimony fully shows that as far as getting in the trunk was concerned "time was not of the essence", that there was no "emergency", in their minds, that required getting into the trunk and that all of the officers knew

it. Their actions speak the truth and are louder in regard thereto than the testimony in the kidnapping case.

If the officers did not already know that Bell was not in the trunk -- why would they stand around while Johnson dressed and wait on the arrival of another police car? The "ransom caller" had already told them Bell was not in the trunk. They had talked at length with William "Peanuts" Johnson, the defendant's brother. Why had they spent so much time looking for an old bench warrant? Clearly, they would have had more than ample time to obtain a search warrant. When they opened the trunk they were NOT looking for Bell. At that point, they were making a routine search for evidence.

They should have had warrants. Clearly, they had ample time to have obtained same prior to coming to the apartment. At least, four to five hours passed between the time they were told the "ransom caller" sounded like "Kurk Kendall Johnson" and when they finally opened the trunk of Johnson's car.

Both the United States Constitution and the Oklahoma Constitution clearly guard against unreasonable searches and seizures. See U. S. Const., Amend. 4; Okla. Const., Art. 2, § 30; and also see 22 Okla. Stat. §§ 1221-1241. It has been consistantly held by this Court that in the absence of a provision of law justifying search without a warrant, evidence obtained as a result of violating this section would not be admissible against a defendant

in a criminal prosecution. See Moulton vs. State, Okla. Cr., 227 P.2d 422; Coburn vs. State, 59 Okla. Cr. 333, 60 P.2d 399; Gatewood vs. State, 57 Okla. Cr. 200, 46 P.2d 962; Wright vs. State, 52 Okla. Cr. 393, 5 P.2d 766; Tidwell vs. State, 52 Okla. Cr. 148, 3 P.2d 454; Roberts vs. State, 47 Okla. Cr. 280, 287 Pac. 793; Lewis vs. State, 39 Okla. Cr. 227, 264 Pac. 840; Hays vs. State, 38 Okla. Cr. 331, 261 Pac. 232; Jones vs. State, 38 Okla. Cr. 251, 260 Pac. 89; and Bassett vs. State, 34 Okla. Cr. 370, 246 Pac. 654, to cite only a few such holdings.

This Court has also held that the interpretation of the Fourth Amendment of the Constitution of the United States by the Supreme Court of the United States is obligatory upon the States by virtue of the Fourteenth Amendment. See Hughes vs. State, Okla. Cr., 522 P.2d 1331; and Lindsey vs. State, Okla. Cr., 488 P.2d 935. This Court is thus bound by the Supreme Court's rulings in this area.

The Supreme Court in Brown vs. United States, 411 U.S. 223, 32 L.Ed.2d 208, 93 S.Ct. 1565, unanimously ruled that the petitioners had no "standing" to contest a search with a defective warrant where:

> (1) The petitioners had no standing to contest the search and seizure, since they
>
> (a) were not on the premises at the time of the contested search and seizure,

(b) had no proprietary or possessory interest in the premises, and

(c) were not charged with an offense which included, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

The case involved a charge of interstate transportation of stolen goods. The goods, stolen from a warehouse in Ohio, were found through a search of a store located in Kentucky and owned by the petitioners' codefendant, whose case was tried separately. The petitioners were in custody in Ohio at the time of the search, which was conducted pursuant to a defective warrant.

Here, Johnson was:

(1) On the premises but was taken away by the police,

(2) The owner of the automobile according to the State's evidence, thereby having a proprietary and possessory interest in same, but

(3) He was not charged with an offense which included, as an essential element of said offense, possession of the seized evidence at the time of the search.

Clearly, the contemporaneous search of Johnson's automobile trunk was unconstitutional and he had "standing" to object which he did. Tr., Sundry Motions, 27 Feb., 1978, pp. 3-14; Trial Tr., pp. 287-289. The search was unconstitutional!

Again, Johnson vs. State, supra, is distinguishable. It was held in that case that "even if the search was unconstitutional", there was still sufficient evidence to convict Johnson of kidnapping. This is not the case here. The State might have proven kidnapping without the evidence obtained in the search but it would not have proven that Johnson committed the homicide.

Discovered in that search of Johnson's trunk that night was a .22 caliber rifle. Casings found at the scene of the shooting of Bell matched test casings fired from the rifle. Without this evidence, there would have been grave questions in the jury's mind.

Harlan Knight and William "Peanuts" Johnson testified to the kidnapping and that Johnson displayed a .22 caliber rifle exclaiming that he was not going to leave any witnesses. The various police witnesses testified to matters relating to evidence of the kidnapping, including possession of items belonging to Bell. The only other connection to the killing was a tape used on the decedent that was similar to that used on Johnson's car, a tape which was obviously common. There was, of course, evidence linking Johnson to the "ransom calls". However, none of the witnesses could testify that Johnson killed Bell. Johnson denied same on his plea and still denies it. Therefore, it is apparent that the State in the homicide case would not

have been able to overcome the test of "beyond a reasonable doubt" without the fruits of the unconstitutional search. See Mincey vs. Arizona, ____ U.S. ____, 57 L.Ed.2d 290, 98 S.Ct. 2408.

III. That the Verdict and Judgment are not Sustained by Sufficient Legal Evidence and are Contrary to Law.

Because of the illegal search discussed in Proposition II, much of the evidence introduced by the State was inadmissable and, in accordance with law, as set forth in Proposition II, not proper to place before the jury.

In addition to the foregoing, the form of the verdict required that the defendant be found "guilty" or "not guilty". While it is recognized by Johnson that this is customarily the case in all criminal proceedings in this State and across the United States, he nonetheless would point out that the jury does not have to find him "not guilty" but only has to have a reasonable doubt regarding his guilt. Therefore, Johnson contends that the form of the verdict was such that it violated his right to "due process of law" and placed upon the jury a duty which the defendant is not required to meet. See U. S. Const., Amend. 5, 6 and 14.

IV. That the Closing Argument of the State was regular and Contrary to the Law.

The United States Supreme Court, subsequent to the charges filed herein, held that mandatory death penalties in statutes such as Johnson was then charged under were unconstitutional. See Woodrow vs. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978; and Roberts vs. Louisiana, 428 U.S. 325, 49 L.Ed.2d 974, 96 S.Ct. 3001; also see Riggs vs. Branch, Okla. Cr., 554 P.2d 823. Further, the United States Supreme Court in granting certiorari in this case, ruled that Johnson could not be tried for First Decree Murder. See Johnson vs. Hampton, District Judge, 429 U.S. 943, 50 L.Ed.2d 314, 97 S.Ct. 364. Thereafter, this Court ordered District Judge Hampton to proceed with the case in accordance with Brown vs. Ohio, supra, and Harris vs. Oklahoma, supra. It specifically did not rule out a trial for some other charge of homicide. See Johnson vs. Hampton, District Judge, Okla. Cr., 572 P.2d 1301.

Title 21, Section 701.2 of the Oklahoma Statutes, the Second Degree Murder statute under which Johnson was tried never ever provided for a "death sentence". Under the law of the case then, Johnson could only be sentenced, if convicted, from ten years to life. See 21 Okla. Stat. § 701.4; and Wood vs. State, Okla. Cr., 557 P.2d 436. Both the prosecutor and Johnson agreed with Judge Hampton, prior to the trial, that this was the law of the case.

Notwithstanding the foregoing clearly being the law of

the case and same being fully understood by the prosecutor, he asserted the following in the State's closing argument:

> "* * * Kurk called him [Peanuts] from the jail. 'Find Duck. Tell him if he is any kind of cousin, he will find that body and get rid of it because if he don't I'll get the electric chair.' They found the body, and after you have seen the evidence in this case, you may wish that the rest of his statement was true there. He said, 'If they don't find the body, I'll get the electric chair.' If there is any person whoever deserved it, he is sitting right in front of you, right there. [Emphasis ours.]

Johnson objected but same was overruled. See Trial Tr., pp. 514-515. This is improper, unfair and prejudicial argument, constituting error. See Robertson vs. State, Okla. Cr. , 521 P.2d 1401; Herrod vs. State, Okla. Cr., 512 P.2d 1401; and Sizemore vs. State, Okla. Cr., 507 P.2d 1330.

Section 5.8, "Argument to the Jury", of the American Bar Association's Standards Relating to the Prosecution Function, sets the guidelines:

> "(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of

any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict." [Emphasis added.]

These standards were adopted by this Court in Ray vs. State, Okla. Cr., 510 P.2d 1395.

Again, the prosecutor said:

"If there is any person whoever deserved it [the electric chair], he is sitting right in front of you, right there."

Clearly, he was attempting to inflame the passions of the jury. His argument went outside the law and injected an issue beyond that of Johnson's guilt or innocence. This Court in the recent case of Cooper vs. State, Okla. Cr., 585 P.2d 234, held that such conduct is error.

CONCLUSION

In conclusion, Johnson would respectfully show the Court that the question of former jeopardy, although argued

before, is still not at rest. It is clear that under the Nielsen Case, 131 U.S. 176, 33 L.Ed 118, 9 S.Ct. 672 (1889) the tests there outlined were not applied to his situation. It is Johnson's contention that he cannot be tried a second time for a crime arising out of the same action.

Further, the evidence obtained by the State's improper search of Johnson's automobile should have been supressed. Without the benefit of such improper evidence, the demurrer offered by Johnson at the conclusion of the State's case should have been sustained.

A verdict should be in a form other than one, as was the case here, that would require the jury to find the defendant "not guilty". The jury is only charged with the duty of finding him "guilty" if they have no "reasonable doubt".

Finally, the closing argument of the prosecutor was inflammatory. The state should not be allowed to argue that the defendant should be executed when same is clearly not the law of the case and the crime with which the defendant is charged carries no such punishment. Such argument by the State was clearly inflammatory to the passions of the jury.

Wherefore, for the reasons aforesaid, Johnson prays the Court to reverse the judgment and conviction herein and to order the District Court to proceed no further with him having to run the "gantlet" again and again.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, the undersigned, do hereby certify and declare that on the 4th day of January, 1979, I mailed a true and correct copy of the foregoing Brief of Appellant in Support of Petition in Error to the Honorable Jan Eric Cartwright, Attorney General, State Capitol, Oklahoma City, Oklahoma, and to the Honorable Larry D. Stuart, District Attorney, County Courthouse, Pawhuska, Oklahoma, with postage thereon fully prepaid.

Bill Heskett

I, Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Brief in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 24 day of January 19 79.

Ross N. Lillard, Jr. Clerk

By [illegible] DEPUTY

IN THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA

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IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN 15 1979
Ross N. Liliard, Jr.
CLERK

No. F-78-516

KURK KENDALL JOHNSON,

Appellant,

vs.

STATE OF OKLAHOMA,

Appellee.

CORRECTION TO APPELLANT'S BRIEF IN SUPPORT OF PETITION IN ERROR

Comes now Kurk Kendall Johnson, after having reexamined the brief submitted in support of his petition in error in the above captioned matter and advises the Court of the following typographical error:

(1) The title to Proposition I at page 5 reads:

> "Error of the Trial Court in Ruling Appellant's Pro Se Writ of Habeas Corpus and the Motion to Dismiss (Second) Plea of Former Jeopardy."

And should read:

> "Error of the Trial Court in Overruling Appellant's Pro Se Writ of Habeas Corpus and the Motion to Dismiss (Second) Plea of Former Jeopardy."

(2) The title to Proposition II at page 11 reads:

"Error of the Court in Ruling the Appellant's Motion to Supress and His Demurrer to the Evidence."

And should read:

"Error of the Court in Overruling the Appellant's Motion to Supress and His Demurrer to the Evidence."

(3) The title to Proposition IV at page 20 reads:

"That the Closing Argument of the State was regular and Contrary to the Law."

And should read:

"That the Closing Argument of the State was Irregular and Contrary to the Law.

Respectfully submitted,

Attorneys for Appellant
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CERTIFICATE OF MAILING

I, the undersigned, do hereby certify and declare that on the 12th day of January, 1979, I mailed a true and correct copy of the foregoing Correction to Appellant's Brief in Support of Petition in Error to the Honorable Jan Eric Cartwright, Attorney General, State Capitol Building, 2302 Lincoln Boulevard, Oklahoma City, Oklahoma, and to the Honorable Larry D. Stuart, District Attorney, County Courthouse, Pawhuska, Oklahoma, with postage thereon fully prepaid.

Bill Heskett

I, Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Correction to Brief ..... in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 24 day of July 19 79.

Clerk

By ..... DEPUTY

No. F-78-516

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KURK KENDALL JOHNSON,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 9 1979
Ross N. Lillard, Jr.
CLERK

BRIEF OF APPELLEE

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TIMOTHY S. FRETS
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STATEMENT OF THE CASE

Appellant, Kurk Kendall Johnson, hereinafter referred to as defendant, was charged by Information in Case No. CRF-75-294 with the crime of Murder in the Second Degree, pursuant to 21 O.S.1971, § 701 in the District Court of Osage County, Oklahoma (O.R. 1). The defendant was tried by jury and represented by counsel. The jury found the defendant guilty and punishment was set at ten (10) years to life in the custody of the State Department of Corrections (O.R. 166). From the aforesaid Judgment and Sentence, the defendant has now perfected his appeal to this Court.

STATEMENT OF THE FACTS

The State opened its case by calling Vernon Davis. He testified that he is an employee of the Picadilly Cafeteria in Tulsa. He stated that he knew the defendant from a supervisor-employee relationship at the Picadilly Cafeteria. Mr. Davis further testified that the deceased, Earl Bell, was his assistant at the cafeteria and that Bell was defendant's supervisor when he was absent. Bell was the supervisor on March 30, 1975.

At approximately 9:50 p.m., on March 30th, Davis stated that he received a phone call at home. The caller said "We have Mr. Dale in our custody and we want $20,000 tomorrow night or he will be killed," (Tr. 175). Davis replied, "You're crazy. I can't get no $20,000. I don't have it," and he hung up (Tr. 176). Four or five similar phone calls

followed from the same male caller but they were felt to be nothing more than prank calls (Tr. 179). A phone call from Mrs. Bell followed at about 11:45 p.m. Davis stated that up to that time he did not know that Bell was missing (Tr. 180). After listening to tape recordings made by the police, in which he identified the voice as that of the defendant's, he was positive that it was the same voice who had called him on the night of March 30th (Tr. 181-182).

The State next called Doris Bell, daughter of the deceased. She testified that at approximately 9:30 or 10:00 p.m., on March 30th, her mother and sister left the house to see if they could find Mr. Bell because he had not returned home from work. While they were gone she received a phone call, at approximately 10:00 or 10:30 p.m. The caller asked if they were looking for Bell and stated, "Well, we've got him and if you don't get $20,000 to us, we will kill him" (Tr. 191).

Celia Hollon was the State's next witness. She stated that she was also a daughter of the deceased, Earl Bell. She testified that she accompanied her mother to the Picadilly Cafeteria to see if Bell had worked late, this occurring at 9:30 p.m. on March 30th. They found Bell's car, its doors still locked, but there was no one in the cafeteria except the night watchman who hadn't seen him. They returned home around midnight after first checking the bank and the police station. At home they found Doris crying. After discussing the aforementioned phone call, the police were summoned.

Further testimony revealed that another phone call was received around 1:00 a.m., after the police had arrived. She said the caller told her to get the $20,000 together and gave her directions to the drop point, which was Vernon Manor Apartments (Tr. 195). She also stated that the caller, a male, indicated that he would kill Bell if the family failed to get the money (Tr. 196).

After stuffing newspaper into a paper bag to represent money, she left with a policeman to go to the drop site, this occurring around 1:30 a.m. She said another phone call was received around 8:00 a.m. which her mother answered. The caller said that he had spotted police at the drop sight and that they were to return for the money (Tr. 200), which was done.

That afternoon, Sunday, March 31st, another phone call was received which was recorded by the police. A subsequent "drop" followed, along with another phone call and another return trip for the package for the same reason as the first.

Another phone call was received with instructions for a third drop attempt. This drop was supposed to occur by a specified parked car. However, the designated car was never found and the drop was aborted. There were no other phone calls (Tr. 205).

Following a stipulation, the State called William Lee Lindley. He testified that he was employed at the Picadilly Cafeteria and that he knew the defendant through their relationship at work. He said that shortly after March 30th he went

to the Tulsa police station where he identified the voice on a tape recording as that of the defendant's (Tr. 214-215).

Lometta Bell, wife of the deceased Earl Bell, next testified for the State. She essentially reiterated the testimony of her daughter Celia Hollon. She did state that she received a phone call while Celia was making the first drop attempt. The contents of that conversation were:

> "Well, first he asked if we had gotten the money, and I said yes, my daughter was bringing it, and he asked me if I called the police, and I said no, and he said he didn't want any police. I asked him how my husband was and he said he was all rght, but he was getting cold in the trunk of that car, something like that, and I think I told him that she would put the money where they asked, and I think the voice said something about if we didn't, we would have a dead honky on our hands," (Tr. 225).

She stated that her husband had been wearing brown slacks, a beige shirt, brown tie, and a brown checkered sports coat (Tr. 231). She then identified the belt and sports coat her husband had been wearing and a lighter he had been carrying.

The State next called Harlan Knight. He testified that he pleaded guilty in 1976 to a charge of robbing Earl Bell by force and fear. It was part of the agreement to enter that plea of guilty that he testify at this trial (Tr. 246). He stated that he knew the defendant well and that they had grown up together.

He testified that defendant came by his house, in a white Oldsmobile, around 7:00 or 8:00 p.m. on March 30th. They

went for a ride and approximately 40 minutes later parked in a parking lot located across the street from the Picadilly Cafeteria. He said that after sitting and talking for a brief period of time defendant suddenly jumped out of the car and said, "We're going to take this man," (Tr. 249). This witness then identified the sport's jacket (State's Exhibit #4) as the clothing the man had been wearing.

After getting Earl Bell into the car they drove to Reservoir Hill where defendant told Bell to get in the trunk (Tr. 251). Knight took $25.30 from Bell's wallet at this time (Tr. 264). They then left for defendant's residence at Comanche Apartments. On the way they were stopped by a man who informed them that their tail lights were inoperative. Upon arriving at the apartments, they checked the wiring to the tail lights and then went inside. Defendant was then asked to call his brother so that he might take this witness home. Harlan Knight further testified that defendant phoned the Picadilly Cafeteria, "to get the manager's telephone number," and a Dennis someboody (Tr. 256). They then returned to the Oldsmobile to try to get the combination of the cafeteria safe out of Bell. Knight stated that when Bell said he didn't know the combination defendant became angry and grabbed the jack handle and began beating Bell with it. He said Bell experienced intense pain and began telling them the combination and said, "Just forget the number. I'm going to try to get the $20,000," (Tr. 257).

They went back inside the apartment to wait on defendant's brother. During the wait, defendant went to a closet and removed a rifle, stating, "This is in case I don't have any witnesses." (Tr. 257). They then returned to the car in order to tie Bell up. Defendant cut Bell's clothes off and tied him up with nylon cord and taped his mouth shut.

They again returned to the apartment and defendant's brother, William Johnson, arrived shortly thereafter. At that time William was informed about Bell and they then left in William's car to take this witness home. This witness further testified that he left for Baxter Springs, Kansas at approximately 8:30 a.m. March 31st, in order to visit some relatives and friends. He stated that he arrived back in Tulsa at 3:00 a.m. the morning of April 1st and that the Tulsa police were waiting for him.

The State next called William Marcell Johnson. Mr. Johnson was not able to be subpoened so his testimony was read to the jury. He is the brother of the defendant and sometimes is referred to by the nickname "Peanuts" (Tr. 281). His testimony showed that he received a phone call from defendant at approximately 11:00 p.m. on the night in question wherein defendant requested the use of his car. Upon arriving at the Commanche Apartments, he went inside where he found defendant, defendant's wife, and Harlan Knight. They (defendant and Knight) told him to come outside and they went to defendant's Oldsmobile where defendant unlocked the trunk revealing Earl Bell (Tr. 290). Defendant stated that "he was a man from Picadilly,"

(Tr. 291), and that defendant was trying to get $20,000 from him (Tr. 292).

This witness further testified that to the best of his knowledge he didn't think the Oldsmobile, with Earl Bell tied up in the trunk, was moved until approximately 4:00 p.m., March 31st, when he observed defendant, Dewayne "Duck" Mayfield, and one other black man driving out of the apartment parking lot (Tr. 298). He stated that his brother was arrested that night and that he received a phone call from the defendant in jail the following day, April 1st. Testimony relating to the contents of that call were:

> "He told me to go find Duck, so I told him I didn't know where Duck stayed at, and so he told me to go find my cousin; told me if Douglas is any kind of a cousin, he will go try to find the body and move it because if he don't if they find the body, he will go to the chair." (Tr. 304, 338-339).

He also stated that, two days prior to the abduction, defendant told him that he was contemplating robbing the Picadilly Cafeteria (Tr. 340). Additionally, he stated that defendant kept a .22 caliber automatic rifle in the closet of the apartment (Tr. 288).

Tulsa police officer C. W. Jordan was the next witness to testify for the State. Officer Jordan was assigned to the surveillance unit of the drop site located by the Vernon Manor Apartments. At 2:00 a.m. on March 31st he observed a black man arrive in an autombile similar to the vehicle in State's Exhibit No. 6. The man, however, aborted his attempt to recover the money. Officer Jordan stated that

he returned to the police station at 3:00 a.m. to assist in an interview of a suspect and found that this suspect (the defendant) was dressed in the same hat and coat as the man at the drop site.

Tulsa police detective Max Sharp next testified that he arrived at the Bell residence around midnight of March 30th. He said that he listened in on a telephone call in which a young negro male demanded $20,000 from her (Celia) or he would kill her father (Tr. 363).

Tulsa police officer Carroll E. Gatlin stated that he was part of the helicopter surveillance team on March 31st. He saw no one attempt to pick up the money at the drop site. Subsequently, he went to the Picadilly Cafeteria to get a roster of present and past employees and then returned to the police station. The roster was then searched for the name "William Lee" which was mentioned on one of the recorded telephone conversations between the Bells and the defendant. The list contained the name William Lee Lindley, who at that time was wanted on two misdemeanor warrants. Lindley was brought to the station where he identified the voice of Kurk Kendall Johnson, the defendant, on the tape recorder (Tr. 376). A check of police records revealed that the defendant was also wanted on a misdemeanor warrant. As a result, several officers proceeded to defendant's apartment to arrest him. Officer Gatlin testified that he and Sergeant Putnam got the Oldsmobile keys from Adrian Knowles, defendant's wife, and looked in its trunk. This

witness stated:

> When we opened the trunk, there was a rifle lying right inside the trunk, there was a crowbar lying in the trunk, and there were indentations from inside the trunk, the approximate size of the tire tool or crowbar I just described -- it's a single tire iron, is what it is. There were inside indentations inside the trunk along the metal and there was a couple of buttons lying in the floor of the trunk." (Tr. 390)

Earl Bell was not found in the trunk (Tr. 394).

Tulsa police officer, Howard Hadley, testified that on April 2, 1975, he conducted a serach for the body of Earl Bell (Tr. 401). He discovered the lifeless body at 8:02 A.M. at a point 2.2 miles north of 57th West Avenue and Edison in Tulsa (Tr. 402).

Roy Goodenough, also a Tulsa police officer, testified that he arrived at the scene where the body was found at approximately 8:30 A.M. He took photographs of the scene, the victim, and the bullet cartridges (Tr. 408). The cartridges were found within six feet of the body. He stated that he also photographed the trunk of the Oldsmobile and searched the car for fingerprints.

J.R. Brown next testified that he was also a Tulsa police officer. He said that on March 31, 1975, he went to the Bell residence at approximately 8:15 A.M. At that time he installed a phone recorder on the Bell telephone. He also recovered from William Johnson a cigarette lighter matching the description of Earl Bell's (Tr. 420). He further stated that he went to the Commanche Apartments on April 2nd where a nearby pond was drained which led to the recovery of a brown leather belt which had the imprinted initials of J.R.B. (Tr. 422).

Tulsa police officer, Bill Putnam, testified that he accompanied Officers Gatlin and Been to the Commanche Apartments on March 31st to serve the warrant on the defendant. He stated that due to the circumstances involved, he requested and received permission from defendant's wife Adria to search the Oldsmobile (Tr. 425-426). The rifle and the tire tool were again noted.

The State next called Police Lieutenant Tom Llewellyn who testified that he photographed and examined the trunk of the Oldsmobile. He stated that the initials present on the .22 caliber rifle were his and that this rifle was removed from the Oldsmobile trunk (Tr. 438). He stated that he recovered one brown cotton sock from the trunk and a matching sock from the murder scene (Tr. 441, 445-446). Other testimony related to the recovery of other articles of clothing and to evidence recovered from the autopsy.

The State's next witness was Dr. Robert Fogel, the pathologist who performed the autopsy on Earl Bell. He testified that he performed the autopsy at 3:00 P.M. on April 2, 1975, and that it was his opinion Earl Bell had been dead 24 to 48 hours (Tr. 468). He believed the cause of death to be a "direct result of the bullet wound of the left occipital region", and that "it resulted in major destruction of the brain and hemorrhage within the cranium" (Tr. 469). It was also his opinion that the bullet fragments removed from the body were of .22 caliber (Tr. 473).

The State's final witness was Robert W. Siebert, a special agent with the FBI. The Court found Mr. Siebert to be an expert in the field of firearms identification. He testified that his examination of one bullet fragment removed from Bell's body revealed that it was fired from a ".22 long rifle caliber" (Tr. 488). He further stated, "On the basis of these observations, I was able to determine that the submitted bullet could have been fired by the submitted rifle" (Tr. 490).

Additional examinations of the bullet casings resulted in this witness' conclusion that the bullets found in Bell's body were fired from the rifle found in the Oldsmobile's trunk (Tr. 493).

The State rested.

The Defense presented only two exhibits, the first a stipulation concerning the non-conclusiveness of FBI laboratory comparisons of recorded voices, and the second, a stipulation that defendant was tried, convicted, and was sentenced to sixty (60) years in prison for the kidnapping of Earl Bell.

PROPOSITION I

DEFENDANT WAS NOT TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE.

Defendant first alleges that the trial court erred in overruling his plea of former jeopardy. Defendant asserts that the offenses charged against him, to-wit: kidnapping and murder, constitute one transaction and thus, one crime,

thereby barring this conviction by virtue of his previous conviction for kidnapping. See Johnson v. State, Okl. Cr. 564 P.2d 641 (1977), 554 P.2d 51 (1976).

It is well recognized that the Fifth Amendment to the Constitution of the United States guarantees against double jeopardy for a single offense. Oklahoma provides that same guarantee via 22 O.S. 1971 §§14, 522 and Art. II, §21 of its Constitution. Each of the above noted provisions, however, speak in terms of "the same offense" or "offenses necessarily included therein". This Court stated in Collins v. State, 70 Okl. Cr. 340, 106 P.2d 273 (1940) at Page 277:

> "The prohibition of the common law and of the constitution is against a second jeopardy for the same offense, that is for the identical act and crime; or as expressed in a number of cases, to entitle a defendant to plead successfully former jeopardy, the offenses charged in the two prosecutions must be the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments are perfectly distinct in point of law, however nearly they may be connected in point of fact. It is not necessarily decisive that the two offenses may have some material fact or element in common, or that they are similar, where they are not in fact the same. The test is not whether defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense." (Emphasis added)

It can therefore be seen that the guarantees against double jeopardy are not an impediment to Congress, or to State Legislatures, to make separately punishable each step leading to the consummation of a prohibited transaction. Gilmore v. United States, 124 F.2d 537 (10th Cir. 1942).

This Court set forth the applicable test to determine if double jeopardy exists in Draper v. State, Okl. Cr. 562 P.2d 155, 167 (1977):

> "'For a double jeopardy claim to be viable, it must be shown that the two offenses charged are in law and in fact the same offense. * * * Offenses are not the same if, upon the trial of one, proof of an addition fact is required that is not necessary to be proved in the trial of the other, although the same acts may be necessary to be proved in the trial of each.'"

Collins v. State, supra at 277, further stated:

> "When a single transaction constitutes two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and when the facts necessary to convict on the second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second."

The ultimate test, therefore, concerns the identity of offenses. It is not necessarily decisive that the two offenses may have material facts in common. Blockburger v. United States, 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932); Draper v. State, supra; Bogue v. State, Okl. Cr., 556 P.2d 272 (1976); Hill v. State, Okl. Cr., 511 P.2d 604 (1973); Stockton v. State, Okl. Cr., 509 P.2d 153 (1973); Thacker v. State, Okl. Cr. 312 P.2d 167 (1957); Beachum v. United States, 218 F.2d 528 (10th Cir. 1955); and Robinson v. United States, 143 F.2d 276 (10th Cir. 1944).

It is readily apparent that kidnapping for extortion and murder in the second degree are separate and distinct offenses. Each requires the proof of a fact which the other does not. Robinson v. United States, supra. Each is subject to a separate and distinct penalty. See 21 O.S. §§ 693, 701 and 707 relating to murder and 21 O.S. §745 relating to kidnapping for the purpose of extortion.

It is also readily apparent that the crime of murder was committed to conceal defendant's first crime of kidnapping. It was stated by this Court in Collins v. State, supra, that such a situation is not unusual.

> "It is not uncommon for persons who have violated the law . . . to go ahead and commit further crimes in an endeavor to conceal or escape from the first offense." 106 P.2d at 278.

From the foregoing, it can be seen that the proof necessary to convict on the kidnapping charge would not necessarily convict on the murder charge. The charges are composed of entirely different elements. To hold otherwise would encourage criminals to commit further crimes in order to conceal or escape from their first criminal act. Should such second or further act be unsuccessful, it would allow them to raise a claim of former jeopardy and escape punishment for what is often a more serious and heinous offense.

PROPOSITION II

DEFENDANT'S MOTION TO SUPPRESS WAS PROPERLY OVERRULED.

For his second assignment of error, the defendant alleges that the trial court erred in failing to sustain defendant's motion to suppress items obtained during the search of the trunk of defendant's automobile. The defendant argues that this was a warrantless search without probable cause and that if there was probable cause there was ample time for the officers to have obtained a search warrant.

The issue raised in this proposition is identical to that presented in an appeal by this defendant of his conviction for the kidnapping of Earl Bell. Accordingly, this Court's opinion in Johnson v. State, Okl. Cr. 554. P.2d 51 (1976) is determinative of this issue.

Further, the record affirmitively indicates that the consent given by defendant's wife was sufficient to render the warrantless search constitutional. Riggle & Cotton v. State, Okl. Cr., ____ P.2d ____, 49 O.B.A.J. 2112 (1978); Rutledge v. State, Okl. Cr., 545 P.2d 1257 (1976). At Page 426 of the transcript, Police Officer Bill Putnam testified:

> "The arrest was made and present at the time was his wife, Adria, and due to circumstances involved, I asked her for permission to search a car parked in front of the apartment. She gave me a set of keys and we checked the trunk . ."

The record is devoid of any showing that defendant's wife was coerced. Also absent is any showing that the Oldsmobile was not under their joint possession or control. Burkham v. State, Okl. Cr., 538 P.2d 1121 (1975) held at Page 1124:

> "Put simply, the rule to be followed in Oklahoma is as follows: In the absence of fraud or express or implied coercion, an affirmative consent to search, given freely and voluntarily by one's spouse, may be used to justify a warrantless search and render its fruits admissible against the absent, nonconsenting spouse, except as to areas and property personal to the nonconsenting spouse and not under joint possession or control."

PROPOSITION III

THE VERDICT FORMS WERE PROPER.

Defendant's third assignment of error alleges that the verdict and judgment are not sustained by sufficient legal evidence and are contrary to law.

In response to the first part of Defendant's allegation concerning the legality of the evidence seized in the search of defendant's vehicle, the State directs the Court to Proposition II of this brief.

The second part of Defendant's allegation states that the verdict forms, to-wit: "guilty" or "not-guilty", deprived him of due process of law in that they placed upon the jury a duty which the defendant is not required to meet. Defendant argues that the jury does not have to find him "not guilty" but only has to have a reasonable doubt regarding his guilt.

The State agrees with the proposition that the jury need only have a reasonable doubt regarding defendant's guilt to acquit him of the crime charged. But, the State disagrees with defendant's allegation that he was deprived of his constitutional right to due process of law.

Title 22 O.S. 1971, §914 sets forth the form for verdicts in criminal cases. It states:

> "A general verdict upon a plea of not-guilty, is either 'guilty', or 'not-guilty' which imports a conviction or acquittal of the offense charged."

The jury instructions, specifically numbers 1,3,4,5,8 and 10, were more than sufficient to instruct the jury of the State's burden to prove defendant's guilty "beyond a reasonable doubt". (O.R. 151-165)

PROPOSITION IV

AT MOST, ANY PREJUDICIAL COMMENT WAS MERELY HARMLESS ERROR.

Defendant's final assertion alleges that the State's closing argument was prejudicial in that it was an attempt to infame the passions of the jury. The alleged prejudicial comment occurred at page 514 of the transcript:

> "The next call that we know he [defendant] made after that was to Peanuts. Peanuts didn't want to have to come up here and say it again, but you heard his prior recorded testimony of it. Kurk called him from the jail. 'Find Duck. Find Duck. Tell him if he is any kind of cousin, he will find that body and get rid of it because if he don't, I'll get the electric chair.' They found the body, and after you have seen the evidence in this case, you may wish that the rest of his statement was true there. He said, 'If they don't find the body, I'll get the electric chair.' If there is any person whoever derserved it, he is sitting right in front of you, right there.
>
> MR. HESKETT: Excuse me, Your Honor. Do I understand counsel to be pleading for the electric chair? It's improper punishment.
>
> THE COURT: Overruled.
>
> MR. HESKETT: Note our exception.
>
> MR. PACENZA: But the Court has instructed you that you can't do it and I'm asking you to follow the law. You may feel that the punishment that you can assess in this case is insignificant compared to what he did. Stripped a man of his clothes, his dignity, tied his hands so tight that there were indentations in his flesh; stopped by a small creek, threw him on the ground and shot him through the head.
>
> You will get a form of verdict in this case and that form of verdict will tell you that if you find him guilty, you must assess a punishment of indeterminate sentence of ten years to life. Insignificant for what he did; insignificant for what he deserves. I ask you now to do your duty. Thank you."

The State maintains that the alleged wrongful comment, when examined in context, cannot be deemed to be prejudicial to the defendant.

Assuming arguendo, that such comment was unfair, it was at most harmless error. 20 O.S. 1971 §3001. Title 21 O.S. 1976 §701.9(b) provides that:

> "B. A person who is convicted of or pleads guilty or nolo contendre to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years, nor more than life."

Any statement no matter how prejudicial could not have affected the defendant's substantive rights. After determing the defendant's guilt, the jury was bound to assess as punishment an indeterminate sentence of ten (10) years to life. The same sentence would have been assessed absent any comment by the District Attorney.

CONCLUSION

Appellant's contentions have been answered by both argument and citatiors of authority. The State urges no error occurred which would require modification, reversal, or dismissal and, therefore, respectfully submits the Judgment and Sentence be affirmed.

Respectfully submitted,

JAN ERIC CARTWRIGHT
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CERTIFICATE OF MAILING

On this 9th day of February, 1979, a true and correct copy of the above was mailed, postage prepaid, to: Mr. Bill Heskett, Heskett, Heskett, Daniel and Esser, 304 First National Bank Building, Pawhuska, Oklahoma 74056.

Timothy S. Frets

TIMOTHY S. FRETS

I, Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Brief in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 14 day of Feb. 19 79

Clerk

By Audrey Lillard DEPUTY

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 21 1979
Ross N. Lillard, Jr.
CLERK

No. F-78-516

IN THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA

KURK KENDALL JOHNSON, Appellant,

vs.

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REPLY BRIEF OF APPELLANT

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AUTHORITIES

	Pages
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Title 22, § 836	6
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IN THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA

No. F-78-516

KURK KENDALL JOHNSON,

Appellant,

vs.

STATE OF OKLAHOMA,

Appellee.

REPLY BRIEF OF APPELLANT

The appellant, Kurk Kendall Johnson, hereinafter called Johnson, files this brief in reply to the answer brief filed herein by the State of Oklahoma on the 9th day of February, 1979.

I. Error of the Trial Court in Overruling Appellant's Pro Se Writ of Habeas Corpus and the Motion to Dismiss (Second) Plea of Former Jeopardy.

The writer of the State's answer brief does not comment upon what the Supreme Court meant in Johnson vs. Hampton, District Judge, 429 U.S. 943, 50 L.Ed.2d 314, 97 S.Ct. 364, when it ordered that this matter proceed in light of Brown vs. Ohio, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221,

and Harris vs. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912. The Court's attention is respectfully directed to Johnson's brief herein, pages 5 through 11.

In his brief, Johnson draws this Court's attention to the Supreme Court's language in Harris, supra, and in Brown vs. Ohio, supra. Further, he specifically drew the Court's attention to the Supreme Court's footnote in Brown vs. Ohio, supra, wherein the Supreme Court set forth distinctions to the Blockburger Test [Blockburger vs. Untied States, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180] and discussed at length in In Re Nielson, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 672. Clearly, the evidence in the Tulsa County kidnapping case and the evidence in the Osage County second degree murder case is identical. And in the words of the Supreme Court in Nielson, supra, the defendant was forced by the State to "run the gantlet" a second time.

The Court should follow the "due process" standards of the Supreme Court and distinguish the Blockburger Test from the case before the Court. While the offenses are different, the evidence was the same, as was the transaction. The Court should, like England, Johnson respectfully submits, adopt a clear constitutional standard and forbid an "ordeal" such as the one now before the bar. See Connelly vs. D.P.P., AC 1254; and also the opinions of Justices Brennan, Douglas and Marshall

in Ashe vs. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 481, 90 S.Ct. 1189, Brown vs. Ohio, supra, and Thompson vs. Oklahoma, 429 U.S. 1053, 50 L.Ed.2d 770, 97 S.Ct. 768.

II. Error of the Court in Overruling the Appellant's Motion to Suppress and His Demurrer to the Evidence.

The State's entire answer to Johnson's proposition is that Adria Knowles was Johnson's wife and that she, as such, gave consent to search Johnson's vehicle. While witness Putnam called her Johnson's wife, as did other witnesses, the State's witnesses and indeed the District Attorney William Hall referred to her as Adria Knowles. See Trial Tr., p. 426; Preliminary Tr., 154, 158, 161 and 166. In addition, the State subpoenaed Adria Knowles, not Adria Johnson. See Dist. Ct. File. Under the law, mere assertions do not make the witnesses' conclusions fact.

It is well established that where a party's right to the relief sought is dependent upon the existence of a so-called common law marriage, the burden is upon such party to establish the facts essential to constitute the marriage. See Jackson vs. Jackson, 182 Okla. 74, 76 P.2d 1062; Impson vs. Kelley, 195 Okla. 666, 163 P.2d 984; In Re Rainey's Estate, 203 Okla. 401, 222 P.2d 510; and Hawkins vs. Hithcock, Okla., 365 P.2d 971. Therefore, the State would be required to establish that Adria

Knowles and Johnson had a mutual intention to consummate marriage, that they cohabitated together as husband and wife and that they held themselves out as husband and wife, in order for it to prove a common law marriage. See Thomas vs. James, 69 Okla. 285, 171 Pac. 608; Vann vs. Vann, 186 Okla. 42, 96 P.2d 76; and Rowland vs. State, 75 Okla. Cr. 164, 129 P.2d 609.

A meretricious relationship of a man and woman without all the elements of a "common law marriage" will not make a marriage. Witnesses merely calling parties husband and wife do not make it so, especially when same is merely based upon a conclusion. See Nichols vs. State, 50 Okla. Cr. 409, 298 Pac. 886. The State did not attempt to prove the elements of a common law marriage and the duty would have clearly been upon it. Further, in neither the kidnapping case in Tulsa County nor in the trial court in the instant matter did the State even suggest such an argument.

Johnson respectfully requests that the Court carefully consider his brief and the matters therein set forth. Obviously, the evidence in the instant case clearly discloses that the officers knew Bell was not in the trunk of the automobile and that there was no "emergency at hand." The evidence in this matter is distinguishable from the evidence in Johnson vs. State, Okla. Cr., 554 P.2d 51.

Clearly, the police officers, under the evidence in this case, made an unconstitutional search. The motion to suppress should have been sustained.

III. That the Verdict and Judgment are not Sustained by Sufficient Legal Evidence and are Contrary to Law.

Johnson's further argument in this proposition is that the verdict is not in proper form notwithstanding that it is the customary form in most, if not all, criminal proceedings in the State. The form of the verdict gave the jury two alternatives: (1) guilty or (2) not guilty. Same places a duty upon the jury that defendant is not required to meet in that if the jury has a reasonable doubt of guilt the jury should find for Johnson and against the State.

It is conceeded by Johnson that the form did comply with Title 22, Section 914 of the Oklahoma Statutes. However, Johnson would hasten to add that it is not the Legislature that sets the constitutional standards but the Constitution and the courts interpreting it.

The Supreme Court of the United States in Leland vs. Oregon, 343 U.S. 790, 96 L.Ed. 1302, 1309, 72 S.Ct. 396, stated:

> "The fact that a practice is followed by a large number of states is not con-

> clusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"

Justice Black in Rochin vs. California, 342 U.S. 165, 96 L.Ed. 183, 192, 72 S.Ct. 205, 25 A.L.R.2d 1396, stated that a test of what are immutabel and fundamental principles of justice should not necessarily be confined only to the notions of English-speaking peoples. The test should be what is fundamentally fair.

In a dissent by Justices Frankfurther and Black in Leland vs. Oregon, supra, they stated:

> "The State cannot be relieved, on a final showdown, from proving its accusation. To prove the accusation it must prove each of the items which in combination constitute the offense. And it must make such proof beyond a reasonable doubt. This duty of the State of establishing every fact of the equation which adds up to a crime, and of establishing it to the satisfaction of a jury beyond a reasonable doubt is the decisive difference between criminal culpability and civil liability." [Emphasis added.]

It is fundamental law that a jury must be convinced of guilt "beyond a reasonable doubt" before it can legally return a verdict of guilty. See 21 Okla. Stat. § 693; 22 Okla. Stat. § 836; Rea vs. State, 3 Okla. Cr. 269, 105 Pac. 381;

Bryan vs. State, 11 Okla. Cr. 180, 144 Pac. 392; Allison vs. State, 11 Okla. Cr. 508, 148 Pac. 824; Nicholson vs. State, 13 Okla. Cr. 123, 162 Pac. 447; Lancaster vs. State, 13 Okla. Cr. 429, 164 Pac. 1152; Mahaffey vs. State, 51 Okla. Cr. 100, 299 Pac. 927; and Slaton vs. State, 97 Okla. Cr. 12, 257 P.2d 330; to cite only a few such holdings. Further, the Supreme Court in Brinegar vs. United States, 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302, held that the rules of evidence and procedure must be consistent with the standard that guilt in a criminal case must be proved beyond a reasonable doubt.

Notwithstanding the foregoing body of both statutory law and case law, the form of the verdict would require the jury to find Johnson "not guilty." Obviously, this is a far different criteria than entertaining an honest reasonable doubt of guilt.

Johnson respectfully submits that where a procedure lacks due process and places a burden on a defendant which is greater than the law would require or demand, then and in that event, it cannot be cured by legislative directives or the passage of time.

IV. That the Closing Argument of the State was Irregular and Contrary to the Law.

In closing argument the prosecutor said:

> "If there is any person whoever deserved it [the electric chair], he is sitting right in front of you, right there."

The State maintains that notwithstanding the "electric chair" or death sentence could not be applied under the law in this case, the prosecutor's comment, when examined in context, cannot be deemed to be prejudicial to Johnson. The State then goes on to quote the balance of the argument. The conclusion of which is:

> "* * * you must assess a punishment of indeterminate sentence of ten years to life. Insignificant for what he did; insignificant for what he deserves. I ask you now to do your duty. Thank you." [Emphasis added.]

In both instances, the State's attorney was expressing his opinion of guilt. Johnson's objection was overruled and no admontion was given the jury. See Holleman vs. State, 74 Okla. Cr. 258, 125 P.2d 239.

The prosecutor's argument in this regard is clearly unethical. See American Bar Association's Standards Relating to the Prosecution Function, § 5.8(b). This Court in the recent case of Cooper vs. State, Okla. Cr., 585 P.2d 234, held that such conduct is error.

The prosecutor was in effect saying:

> "Johnson is guilty and the punishment allowed by law is 'insufficient.' He should be put to death."

Regardless so goes the State's argument, the comment was "at most harmless error." The author of the State's answer brief asserts, "The same sentence would have been assessed absent any comment by the District Attorney."

If the Court would condone the State's argument in this regard then a prosecutor could say whatever, and so long as there was no discretion for the jury as to sentence, there would be no error. Under such a theory, the prosecutor could have said:

> "This Nigger is guilty. He should be tied-up, thrown in a ditch and shot to death."

Clearly, this Court would not tolerate such comment or conduct. However, it does point out the faulty reasoning of the State's brief.

The prosecutor was concluding his comments. His comments were an effort to substitute his opinion for that of the considered decision of the jury; to appeal to their passion; to prejudice their minds in the deliberative process.

In terms of transactional psychology, the prosecutor effectively let his prejudged and biased opinion be imposed

upon the minds of the jury. He was playing the role of "parent" and they were made "children." See Harris, I'm OK, You're OK, pp. 38-59. Without the trial court's admonition, a situation such as this is extremely dangerous!

Unfair comment without admonition of the trial court, creates a risk that goes to the very heart of the trial "guilty" or whether there is, in fact, a reasonable doubt of guilt. This Court has held that where the result of a comment would inflame the minds of a jury, and the trial court failed to admonish the jury not to consider the matter, same was reversible error. See Pebworth vs. State, 88 Okla. Cr. 97, 199 P.2d 621.

CONCLUSION

In conclusion, Johnson would respectfully urge the Court to consider the matters herein as same fully respond to the State's answer brief. Further Johnson would again urge those matters set forth in his brief herein, together with the conclusions therein set out.

Wherefore, Johnson prays the Court to reverse the judgment and conviction herein and to order the District Court to proceed no further with him having to continue this trial by "ordeal."

Respectfully submitted,

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CERTIFICATE OF MAILING

I, the undersigned, do hereby certify and declare that on the 19th day of February, 1979, I mailed a true and correct copy of the foregoing Reply Brief of Appellant to the Honorable Jan Eric Cartwright, Attorney General, State Capitol, 2302 Lincoln Blvd., Oklahoma City, Oklahoma 73105; and to the Honorable Larry D. Stuart, District Attorney, County Courthouse, Pawhuska, Oklahoma 74056, with postage thereon fully prepaid.

Bill Heskett

I, Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Brief in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 26 day of July 19 80.

Clerk

By [signature] DEPUTY

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 6 1979
Ross N. Lillard, Jr.
CLERK

TO: ROSS N. LILLARD JR., CLERK
COURT OF CRIMINAL APPEALS

ORDER SUBMITTING CAUSES

IT IS HEREBY ORDERED that the following causes are submitted this 6th day of March, 1979, in accordance with the Rules of this Court:

F-77-696 GENE KAVIN STARR V. STATE OF OKLAHOMA

M-78-225 DAVID L. WARWICK V. STATE OF OKLAHOMA

C-78-260 DALE ERWIN LANG V. STATE OF OKLAHOMA

F-78-307 ARDIE LOUIS ROBERTS V. STATE OF OKLAHOMA

F-78-396 REFORD D. JOHNSON V. STATE OF OKLAHOMA

F-78-403 STEVE CARTER V. STATE OF OKLAHOMA

~~F-78-425 KYLE HUNTER [illegible] V. STATE OF OKLAHOMA~~

F-78-433 BILLY JOE CHUCULATE V. STATE OF OKLAHOMA

F-78-465 LEWIS AARON BOWEN V. STATE OF OKLAHOMA

F-78-516 KURK KENDALL JOHNSON V. STATE OF OKLAHOMA

F-78-526 WALTER LEE TOLE V. STATE OF OKLAHOMA

F-78-542 RONALD GENE SMITH V. STATE OF OKLAHOMA

F-78-544 DALE EUGENE GILL V. STATE OF OKLAHOMA

F-78-626 GARRELL MOORE V. STATE OF OKLAHOMA

F-78-662 GARY L. JAMES V. STATE OF OKLAHOMA

~~C-78-679 [illegible] V. STATE OF OKLAHOMA~~

F-79-8 EDDIE COUTS V. STATE OF OKLAHOMA

C-79-46 CHARLES FRANK TAHSEQUAH V. STATE OF OKLAHOMA

WITNESS MY HAND, and the Seal of this Court, this 6th day of March, 1979.

TOM R. CORNISH, PRESIDING JUDGE

ATTEST:

Ross N. Lillard Jr.
CLERK

Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Order in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 6th day of March, 1979.

Clerk

By [illegible] DEPUTY

A-7

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY 21 1980
Ross N. Liliard, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FOR PUBLICATION

KURK KENDALL JOHNSON,
Appellant,
-vs-
THE STATE OF OKLAHOMA,
Appellee.

No. F-78-516

AUTHORIZED FOR FILING
MAY 21 1980
COURT OF CRIMINAL APPEALS

- O P I N I O N -

CORNISH, Presiding Judge:

The appellant was arrested on March 31, 1975, for the kidnapping of Earl Edward Bell. The authorities later discovered that Bell had been murdered. Because it appeared that the abduction occurred in Tulsa County, the appellant was charged in the Tulsa County District Court, Case No. CRF-75-690, with the crime of Kidnapping for the Purpose of Extortion. He was also charged with the crime of First Degree Murder in the District Court of Osage County, Case No. CRF-75-294, where the body was found.

Preliminary hearings were held and the appellant was bound over on both charges. On September 3, 1975, the appellant moved for a continuance of the murder trial in Osage County until after the conclusion of the Tulsa County trial on the kidnapping charge. The motion was granted. On September 5, 1975, the appellant was convicted by a Tulsa County District Court jury of Kidnapping for the Purpose of Extortion. He was sentenced to sixty (60) years' confinement. On appeal this Court affirmed the conviction. See Johnson v. State, Okl.Cr., 554 P.2d 51 (1976), cert. denied, 429 U.S. 943, 97 S.Ct. 364, 50 L.Ed.2d 314 (1976). Thereafter, the appellant was convicted of Murder in the Second Degree in the District Court of Osage County. Punishment was fixed at ten (10) years to life imprisonment.

I

In this appeal of his murder conviction, the appellant raises the issue of double jeopardy. He argues that the murder and

the kidnapping were parts of a single criminal episode and that, therefore, the kidnapping conviction barred the murder trial.

A

The double jeopardy issue was first presented to the Osage County District Court on December 8, 1975. At that time the appellant entered a plea of double jeopardy to the first degree murder charge and filed a motion to strike all references to the crime of kidnapping from the information for first degree murder. The motion was denied. The appellant then petitioned this Court for a writ of mandamus ordering the Osage County District Court to grant the motion to strike. This Court, in a per curiam opinion, denied the writ, stating:

> ". . . No former jeopardy claim is sustainable as Murder in the First Degree is a separate and distinct offense protecting a different societal interest than Kidnapping for the Purpose of Extortion. Williams v. State, Okl.Cr., 321 P.2d 990 (1957), Williams v. Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959)." Johnson v. Hampton, Okl.Cr., 564 P.2d 641 (1977), 11 A.L.R.3d 840 (Supp. 1979)[1]

The United States Supreme Court granted certiorari, vacated this Court's order denying the writ of mandamus, and remanded for further consideration with particular attention to Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); and Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). See Johnson v. Hampton, 434 U.S. 947, 98 S.Ct. 471, 54 L.Ed.2d 307 (1977).

On remand this Court held that the crime of first degree murder, as charged, necessarily included the lesser offense of kidnapping for the purpose of extortion. We prohibited the trial of the appellant as originally charged, but further stated:

> "This order is made without prejudice to the trial of the said Kurk Kendall Johnson on any charge of homicide which the facts and justice may warrant, not inconsistent with the views expressed by the Supreme Court of the United States in Brown v. Ohio, and Harris v. Oklahoma, supra." Johnson v. Hampton, Okl.Cr., 572 P.2d 1301 (1978).

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[1]For cases from other jurisdictions, see Annot. "Earlier Prosecution for Offenses During which Homicide was Committed as Bar to Prosecution for Homicide." 11 A.L.R.3d 834 (1967).

Subsequently, over the appellant's renewed plea of double jeopardy, he was convicted of the crime of Murder in the Second Degree.

B

The first assertion of error is the trial court's denial of the appellant's renewed motion to dismiss based on the plea of double jeopardy. The appellant urges us to apply the rule sometimes referred to as the "same transaction test." Under that rule a person cannot be held to answer for separate crimes at consecutive trials when the separate crimes were parts of a single criminal episode.

Generally, as noted in Gowler v. State, Okl.Cr., 589 P.2d 682 (1979), in determining the viability of a double jeopardy claim, the courts have utilized two tests referred to as (1) the "same evidence test" and (2) the "same transaction test," or a variation of the two. The "same evidence test" was initially employed in the English case of Rex v. Vandercomb and Abbott, 2 Leach 707, 168 Eng.Rep. 455 (1796). Morey v. Commonwealth, 108 Mass. 433 (1871), stated the rule in the first case to apply the rule in this country:

> "A conviction or acquittal upon one indictment is no bar to a subsequent conviction or sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other."

Traditionally, the test employed to determine whether a person has been placed in jeopardy twice for a single offense has been to ask whether each of the offenses charged requires proof of an additional fact that is not necessary to the other. Thus, a single act may be an offense against two statutes. If each statute requires proof of an additional fact which the other does not, neither multiple prosecutions nor multiple punishments are barred by the prohibition against double jeopardy, even though each offense may arise from the same act or criminal episode. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); Collins v. State, 70 Okl.Cr. 340, 106 P.2d 273 (1940).

We find no consistent solution to the problem in examining prior cases from this Court. The same is true when we look to other

jurisdictions. The United States Supreme Court has not said any one test is required by the Fifth Amendment.

Extensive research on this question indicates that the "same evidence test" is utilized by a majority of state and federal courts.[2] However, the problem is that with the proliferation of separately defined substantive crimes by the state legislatures the number of substantive offenses that may arise from a single criminal transaction has increased markedly. Thus, mechanical application of the "same evidence test" results in a decrease in the double jeopardy protection.

Critics of the same evidence test include in their ranks current members of the United States Supreme Court. In Ashe v. Swenson, 397 U.S. 436, 451, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), Justice Brennan, in a separate opinion in which Justices Douglas and Marshall joined, made a scathing attack upon the same evidence test, finding that it "virtually annuls the constitutional guarantee." He further said:

> ". . . The 'same evidence' test permits multiple prosecutions where a single transaction is divisible into chronologically discrete crimes. . . . Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution, the potentialities for abuse inherent in the 'same evidence' test are simply intolerable." (Citations omitted, footnotes omitted)

Other critics and modern writers maintain that the proper test to determine whether a person has been twice placed in jeopardy for a single offense is to ask whether the offenses charged were parts of the same criminal act, occurrence, episode or transaction.[3] If the

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[2]Twice in Jeopardy, 75 Yale L.J. 262 (1965).

[3]Note, Criminal Law: The Same Offense in Oklahoma -- Now You See it, Now You Don't, 28 Okl.L.Rev. 131 (1975); Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432, 435, 436 (1973); State v. Brown, 497 P.2d 1191 (Or. 1972); Noe, Criminal Law-Double Jeopardy -Should "Offense" be Defined in Terms of Substantive Law?, 38 Mo.L.Rev. 528, 530 (1973); Note, The Protection Against Multiple Trials, 11 Stan.L.Rev. 735 (1958).

answer is in the affirmative, then multiple prosecutions or punishments should be barred by the Double Jeopardy Clause. It is urged that the "same transaction test," by consolidating in one lawsuit all issues arising out of a single transaction, best promotes justice, economy and convenience.

The "same transaction test" has been adopted in some states by statute.[4] A few states have adopted the test by court decision.[5] It is also interesting to note that in England, where the "same evidence test" derived, the House of Lords indicated in 1964 that joinder of offenses arising out of the same transaction would be required in the future. Connelly v. Director of Public Prosecutions, A.C. 1254 (1964).

We would also point out that the "same transaction test" as viewed by Justice Brennan does not necessarily preclude a defendant from being convicted and punished for each offense joined. Abbate v. United States, 359 U.S. 187, 198, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959). Thus, it is possible to apply the "same transaction test" to determine when offenses should be joined, yet apply the "same evidence test" to determine whether the defendant can be subjected to separate convictions and punishments for the offenses joined. Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973), n. 5.

Utilizing this test, this Court has held that separate crimes were in fact committed when two or more crimes were committed within the same brief span of time. Starnes v. State, Okl.Cr., 507 P.2d 920 (1973). Also, where crimes against separate and distinct persons were involved, we have held that, even though the crimes were a part of one criminal episode and were similar in nature, prosecution for each separate offense was not barred. Jennings v. State, Okl.Cr., 506 P.2d 931 (1973).

C

Much of the confusion surrounding the double jeopardy concept arises from the injustice of applying either test, to the

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[4] See N.Y.Crim.Proc.L. 40.20(2); 40 Minn.Stats.Anno. 609.035

[5] State v. Ahuna, 52 Hawaii 321, 474 P.2d 704 (1970).

exclusion of the other, in all cases. In this regard, it must be recognized that the Double Jeopardy Clauses of our State and Federal Constitutions are intended to protect against two distinct abuses. The first is requiring an accused to endure a series of trials where the same offense is charged; the second of these is the infliction of multiple punishments for a single offense. Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). A clear understanding of these distinct functions of the Double Jeopardy Doctrine makes clear the undesirability of adopting either the "same evidence test" or the "same transaction test" to the exclusion of the other. An analysis of past decisions of this Court reveal what we believe to be a proper working relationship between the two tests.

In the case of Starnes v. State, supra, the defendant was charged with robbery by force and attempted rape, with both offenses arising out of one criminal episode. He pleaded guilty to both charges, and concurrent sentences were imposed. On appeal, the defendant contended that the offenses arose out of the same event and that, therefore, it was error to convict the defendant of two separate offenses. The aspect of double jeopardy involved in Starnes was the protection against multiple punishments for a single offense. In upholding the imposition of separate punishments, this Court employed the "same evidence test," finding that the robbery and the attempted rape were two separate and distinct offenses, consisting of different elements. Application of the "same evidence test" under the facts of Starnes does not, however, necessarily imply that the "same transaction test" cannot be applied to other factual circumstances.

In Lawson v. State, Okl.Cr., 484 P.2d 900 (1971), the defendant broke into the victim's home with the intent to commit larceny. When confronted inside the home, he robbed the victim at gunpoint. The defendant was tried and convicted of armed robbery and was later convicted of burglary. On appeal the burglary conviction was reversed. The Court held that the same evidence was used in both trials. In ruling that there could not be separate

trials for the burglary and the robbery, this Court employed the "same transaction test" to determine that the defendant had been tried twice for a single offense.

The conclusion to be reached after a careful analysis of Starnes and Lawson is that this Court has not accepted either the "same evidence test" or the "same transaction test" exclusively. Rather, recognizing the distinct functions of the Double Jeopardy Doctrine, this Court has adopted the test that would most advance the interests of justice in each particular case.

Following this view, we have held that where a defendant robbed a drugstore, taking money and narcotics, and was arrested four hours later in possession of narcotics, consecutive trials and convictions for armed robbery and possession of narcotics were not barred by the Double Jeopardy Doctrine. Ryan v. State, Okl.Cr., 473 P.2d 322 (1970). In a special concurrence, it was emphasized that the distinguishing features in the case were the time and location of the two offenses, the implication being that had the narcotics offense not been carried over to a distant time and place the result would have been different. Compare Hochderffer v. State, 34 Okl.Cr. 215, 245 P. 902 (1926), where the elements of time and location were the same. On the other hand, where two defendants kidnapped the victim and, with a third defendant, then committed rape of the same victim, we found that the act of kidnapping the victim was but a part of the force requisite to the greater offense of rape. We held that the defendants could not be punished for both kidnapping and rape, which was one transaction. Brumbelow v. State, Okl.Cr., 488 P.2d 1298 (1971).

Perhaps some confusion has resulted from our opinion in Smith v. State, Okl.Cr., 486 P.2d 770 (1971). There, the defendant was charged with robbing a taxi driver at knife point, taking the victim's money after stabbing him once in the neck and twice in the chest. The defendant was first convicted of assault and battery with a deadly weapon with intent to kill, and that conviction was affirmed. See Smith v. State, Okl.Cr., 481 P.2d 804 (1971). At a later trial, the defendant was convicted of robbery with a

dangerous weapon, and on appeal, he raised a double jeopardy question. A strict application of the "same evidence test" would not have required a reversal because the intent to kill is not an element of robbery and, conversely, assault with intent to kill does not require the taking of property from the victim. However, this Court reversed the robbery conviction, holding that separate trials could not be held on the robbery and assault charges.

Smith v. State, supra, could be read to imply that 22 O.S. 1971, § 11,[6] mandates application of the "same transaction test" exclusively when construing Art. 2, § 21,[7] of the Oklahoma Constitution. We intended no such implication, and the cases cited do not support that conclusion. In Smith this Court cited State v. Mendoza, 107 Ariz. 51, 481 P.2d 844 (1971), in which the defendant committed a forcible rape after threatening the victim with a knife. At a single trial, the defendant was convicted of the crimes of assault with a deadly weapon and first degree rape. The

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[6]Title 21 O.S.1971, § 11, provides:

"If there be in any other chapter of the laws of this state a provision making any specific act or omission criminal and providing the punishment therefor, and there be in this penal code any provision or section making the same act or omission a criminal offense or prescribing the punishment therefor, that offense and the punishment thereof, shall be governed by the special provisions of this penal code. But an act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, except that in cases specified in §§ 51 and 54, the punishments therein prescribed are substituted for those prescribed for a first offense, but in no case can [it] be punished under more than one; and an acquittal or conviction and sentence under either one, bars the prosecution for the same act or omission under any other." (Footnote omitted)

[7]Art. 2, § 21, of the Oklahoma Constitution, provides:

"No person shall be compelled to give evidence which will tend to incriminate him, except as in this Constitution specifically provided; nor shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that of which he has been acquitted. Nor shall any person be twice put in jeopardy of life or liberty for the same offense."

Arizona Supreme Court affirmed the rape conviction and reversed the conviction for assault with a deadly weapon. In so doing, the Court stated:

> "In a recent opinion of this Court, wherein the defendant was charged with attempted kidnapping while armed with a gun, Count I, and assault with a deadly weapon or instrument, to wit: a gun, Count II, both offenses or counts arising out of the same act, our Court stated that the 'practical test is to eliminate the elements in one charge and determine whether the facts left would support the other charge.' State v. Mitchell, 106 Ariz. 492, 478 P.2d 517, 520 (1970). In the instant case, it is clear that the element of force or violence necessary to the crime of 1st degree rape was supplied by the fear of personal violence induced by the defendant's usage of a deadly weapon, to wit: the knife, and without such usage that the element of 1st degree rape would not exist. . . ." (Citation omitted)
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> "We do not by this opinion hold that there cannot be fact situations wherein a person may be convicted of both assault and 1st degree rape. That determination must be made on a case to case basis. We do hold that under the facts in this case the two convictions and sentences cannot stand together. . . ." (Citations omitted)

From the language, it is clear that the Arizona Court utilized the "same evidence test" in deciding the double jeopardy issue.

In People v. Ridley, 63 Cal.2d 671, 47 Cal.Rptr. 796, 408 P.2d 124 (1965), also cited in Smith v. State, supra, the defendant was charged with assault with a deadly weapon with intent to commit murder and first degree robbery. At a single trial, the defendant was convicted of both offenses. Use of the "same evidence test" resulted in a finding that the assault was the means of perpetrating the robbery and that both offenses were incident to one objective, robbery. Therefore, the defendant could be punished for any one of the offenses, but not for more than one. There was only a single offense, and the defendant could not be tried twice for it. In re Henry, 65 Cal.2d 330, 54 Cal.Rptr. 633, 420 P.2d 97 (1966), presented the Court with the same issue, and the same rationale was employed in an opinion by Chief Justice Traynor.

Both Arizona and California have statutes similar to 21 O.S.1971, § 11. See Ariz. Rev. Stats., § 13-1641, and the California Penal Code, § 654. See also Wildman v. State, 42 Ala.App.

357, 165 So.2d 396 (1963).

While a few states have adopted the same transaction standard as a matter of state law, it has not been applied as a federal constitutional requirement. As noted in Cousins v. State, 354 A.2d 825 (Md.App.1976), the majority of states have not adopted the "same transaction test" but have continued to apply the "same evidence test" for defining whether two offenses are the same for double jeopardy purposes. Cited therein as rejecting the "same transaction test" is Kupiec v. State, Okl.Cr., 493 P.2d 444, 446 (1972).

In Kupiec the defendant forced his way into a house, took various items of personal property, and raped one of the residents. There were separate trials for armed robbery and rape, with evidence of both crimes being presented at both trials. The defendant's double jeopardy argument was rejected, using a strict "same evidence" approach. The Court said that the armed robbery and the rape were clearly separate and distinct crimes and that the proof required for each was quite dissimilar. The "evidence of other crimes" issue was also raised, but it was treated by the Court's saying that evidence of other crimes was properly admitted in both cases as part of the res gestae.

D

In reaching what we believe to be a reasonable approach to this complex issue, we note that the cases raising double jeopardy claims come within a few broad categories. In one category, are those cases in which, in a single trial, a defendant is convicted of two offenses arising from the same general criminal episode. In such cases we have generally held that the interests of justice are best served by application of the "same evidence test" to determine the propriety of multiple charges. In another group are those cases in which a defendant is convicted of two crimes, one of which is, as a matter of law, a necessary element of the other. Here, whether there was one trial or two, application of either test will result in one conviction being vacated.

The preceding categories are the black and white groups. In

the gray category are those cases in which there are multiple trials for crimes which, while distinct in law, constitute parts of a single criminal episode. In dealing with these cases, an appellate court must consider both aspects of double jeopardy discussed above: More than one trial for a single offense and more than one punishment for a single offense. We believe that the protection against multiplicity of trials is best advanced by application of the "same transaction test." However, the protection against multiplicity of punishments is a separate and independent question; and even where the "same transaction test" mandates a single trial, application of the "same evidence test" could result in a holding that a defendant could be punished separately for each of the offenses involved. In this connection, we again remind prosecutors of the special concurring opinion attached to Dodson v. State, Okl.Cr., 562 p.2d 916 (1977), in which Judge Brett explained that where a series of acts is involved, an accused can be charged with several counts in a single information.[8] It should not be inferred that because we treat the double jeopardy issue in one case by using one test this Court will not apply the other test in appropriate cases.

By this opinion we do not, in the words of Mr. Chief Justice Burger, find ourselves "endowed with a perception all our predecessors lacked and in an area of the law encountering no new facts." See the dissenting opinion by Burger, C. J., in Ashe v. Swenson, supra, 397 U.S. at 464. Instead, we merely follow the collective wisdom of this Court's prior decisions and elect that course which allows this Court to utilize the necessary tools to accomplish the task before it. In taking this course, we do nothing more than elevate the distinct purposes of the Double Jeopardy Doctrine to the equal dignity and reverence each deserves.

This reasoning leads us to conclude that while the appellant

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[8]Further, pursuant to 22 O.S.1971, § 439, if it appears that a defendant or the State is prejudiced by joinder of offenses in an indictment or information, the court shall order an election or separate trial of counts or provide whatever other relief justice requires.

herein could be punished separately for Murder in the Second Degree and Kidnapping for the Purpose of Extortion, both crimes should have been adjudicated in a single trial. The murder charge could not have been tried in Tulsa County because of a lack of venue; however, because kidnapping is a continuing crime, both charges could have been, and should have been, tried in Osage County.[9]

On the other hand, public interest in the effective administration of the criminal justice system precludes a defendant from waiting until a criminal proceeding is ended to begin asserting alleged denials of constitutional protections. There are, of course, some constitutional rights which are never finally waived. Lack of jurisdiction, for instance, can be raised at any time. This is not true of the double jeopardy protection. See Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977). Although both the murder and the kidnapping cases were in process at the same time, the appellant did not raise the double jeopardy issue until the case in Tulsa County (kidnapping charge) had been completed. In fact, he succeeded in postponing the Osage County case (murder charge) until the other one was over. Had the issue been raised in the beginning, the kidnapping charge could have been dismissed in Tulsa and filed in Osage County, so that the two charges could have been tried together; whereas enforcement of the double jeopardy protection in accordance with the appellant's strategy would have barred prosecution of the appellant on one of the charges. This Court, accordingly, holds that the appellant waived his double jeopardy protection.

II

The appellant next asserts that the trial court erred in overruling defense counsel's motion to suppress and his demurrer to the evidence. He asserts the verdict is unsupported by the

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[9]Or, had there been no kidnapping charge in another county, the Osage County District Attorney could have forgone the kidnapping charge and filed a single charge of murder.

evidence. As each item of evidence was introduced at trial the defense attorney responded, "No objection." The failure to object to evidence admitted at trial is a waiver of any error that such admission might have constituted. Box v. State, Okl.Cr., 541 P.2d 262 (1975). The logical implication of the failure to object is that the appellant acquiesced in the court's ruling on the motion to suppress. It follows that the appellant's assertion is also without merit because evidence admitted at trial without objection may be properly considered by the jury.

III

We next consider the allegation that the verdict forms were defective. The appellant insists that the usual verdict forms slur over the State's burden of proof: instead of forms for finding an accused "guilty" or "not guilty," he proposes that the forms should read "guilty beyond a reasonable doubt" and "there is a reasonable doubt as to guilt." In his instructions to the jury, the judge specified the burden of proof numerous times; and he expressly told the jury that if they could not find beyond a reasonable doubt that the appellant was guilty, then they were obliged to find him not guilty. The appellant's argument is unsound.

IV

The final assertion of error is that the prosecutor's closing argument was improper. Specifically, the appellant contends that in referring to the testimony of the appellant's brother relative to a telephone conversation between the appellant and his brother, the prosecutor recounted, "Find Duck. Tell him if he is any kind of cousin he will find that body and get rid of it because if he don't, I'll get the electric chair." The prosecutor then continued, "They found the body, and after you have seen the evidence in this case, you may wish that the rest of his statement was true there. He said, 'If they don't find the body I'll get the electric chair.' If there is any person whoever deserved it, he is sitting right in front of you, right there."

The appellant contends that this reference to the death penalty during closing argument was so prejudicial to the appellant

as to require a reversal. We do not agree. The trial court properly instructed the jury with regard to the sentence to be imposed upon a conviction for second degree murder. In view of the proper instruction of the court, the complained of error in the prosecutor's closing argument, if error at all, did not violate a substantial right of the accused.

The judgment and sentence is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT, OSAGE COUNTY, OKLAHOMA,
HONORABLE DON H. HAMPTON, JUDGE

KURK KENDALL JOHNSON, appellant, was convicted of the offense of Second Degree Murder; was sentenced to ten (10) years' to life imprisonment, and appeals. AFFIRMED.

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OPINION BY CORNISH, P. J.
BRETT, J., CONCURS
BUSSEY, J., SPECIALLY CONCURS

BUSSEY, J., SPECIALLY CONCURRING:

The offenses of kidnapping and murder in the second degree are separate and distinct crimes under the facts of this case. Cf. 21 O.S.Supp.1976, § 701.8, ¶ 2, and Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). A conviction for one should not bar the prosecution and conviction of the other. In summary, each of these charges requires the proof of at least one and, in fact, several facts or elements that proof of the other does not so require. The Double Jeopardy Clauses of the state and federal constitutions are not offended by separate prosecution and punishment here. See Clay v. State, Okl.Cr., 593 P.2d 509 (1979), and Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).